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No. 00-381

IN THE

Supreme Court of the United States

CITY OF BRIDGETON,

Petitioner,

v.

FEDERAL AVIATION ADMINISTRATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In preparing the Environmental Impact Statement required by the National Environmental Policy Act ("NEPA") for a multi-billion dollar airport expansion project at Lambert-St. Louis International Airport, the Federal Aviation Administration analyzed in detail only runway alternatives that it concluded would provide dual simultaneous independent Instrument Flight Rules ("IFR") arrivals, disregarding runway alternatives that do not provide dual simultaneous independent IFR arrival capability but that would accomplish the principal goals of the airport expansion project. In its analysis of the runway alternatives under Section 303(c) of the Department of Transportation Act ("Section 4(f)"), the Federal Aviation Administration, while acknowledging that both alternatives under consideration would physically take resources that are protected by Section 4(f), selected the Preferred Alternative as the alternative that will minimize harm to Section 4(f) resources based on a quantitative analysis and without engaging in all possible planning to minimize harm to Section 4(f) resources.

The questions presented are:

(1) Whether the court of appeals erred in holding, contrary to other circuit courts, that an agency may narrow the range of alternatives to be evaluated in detail in a NEPA analysis by excluding from consideration an alternative that does not provide certain operational capability, but that would achieve the purposes of the project.

(2) Whether the court of appeals erred in holding, contrary to other circuit courts, that the Department of

Transportation or a constituent agency may use as the *sole* criterion for selecting the "least harm" alternative under Section 4(f)(2), the total acres of Section 4(f) resources used by each alternative.

(3) Whether the court of appeals erred in holding, contrary to another circuit court, that the Department of Transportation or a constituent agency may select the Preferred Alternative as the "least harm" alternative under Section 4(f)(2) when the agency has not engaged in a comparable level of analysis and planning for all of the alternatives under consideration.

PARTIES TO THE PROCEEDING

The petitioner is the City of Bridgeton, Missouri. The respondents in this case are the Department of Transportation, Rodney E. Slater, in his capacity as Secretary of Transportation, the Federal Aviation Administration, Jane F. Garvey, in her capacity as Administrator of the Federal Aviation Administration, and John F. Turner, in his capacity as Regional Administrator of the Federal Aviation Administration. The City of St. Charles, Missouri and the County of St. Charles, Missouri, also are respondents. Each jurisdiction was a petitioner below.

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OPINION BELOW

The opinion of the court of appeals, Appendix ("App.") 1a-35a, is reported at 212 F.3d 448. The order of the court of appeals denying rehearing and rehearing *en banc*, App. 38a, is reported at 2000 U.S. App. LEXIS 13701.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 17, 2000. App. 36a-37a. A petition for rehearing and rehearing *en banc* was denied on June 13, 2000. App. 38a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Provisions of the National Environmental Policy Act and the regulations implementing the Act are reproduced, in relevant part, at App. 39a-41a.

Section 303(c) of the Department of Transportation Act provides:

> [t]he Secretary may approve a transportation program or project . . . requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance . . . only if — (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to

> minimize harm to the park, recreation area, wildlife and water fowl refuge, or historic site resulting from the use.

49 U.S.C. § 303(c).

STATEMENT OF THE CASE

This case arises from the Federal Aviation Administration's approval of a pla to expand Lambert-St. Louis International Airport ("Lambert") by constructing Alternative W-1W ("W-1W"), which comprises a new 9,000 foot runway southwest of the existing airfield, associated taxiways and ramps, and a number of smaller improvements. W-1W would be located almost entirely in a stable residential neighborhood in the City of Bridgeton.

St. Louis requested funding from the Federal Aviation Administration ("FAA") for the W-1W project. Accordingly, FAA prepared an Environmental Impact Statement ("EIS") pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). The final version of the EIS was certified on December 9, 1997 ("FEIS").

Initially in the EIS, FAA considered eight "airfield alignment alternatives" that would provide additional capacity by constructing one or more new runways on and/or adjacent to Lambert's existing airfield. These alternatives fall into four general groups based on the location of the new runway. The northern options, which include alternatives N-1, NE-1, and NE-1a, would place a new runway approximately 1,200 feet north of the existing northern runway but in differing east-west alignments. N-1 and NE-1 also would place a new runway approximately

1,000 feet south of the existing southern runway and would replace the existing passenger terminal with a new terminal between the two new runways.

The western alternatives, which include alternatives W-1W, W-1E and W-2, would locate a new runway southwest of the existing airfield, but in differing east-west alignments. The southern alternative, S-1, would locate a new runway approximately 5,500 feet south of the existing southern runway. Finally, the canted alternative, C-1, would reconstruct the entire airfield and add a third runway.

The project purposes are described in the FEIS as: (1) enabling Lambert to effectively and safely accommodate projected levels of aviation activity at an acceptable level of delay; (2) enhancing the National Airspace System by reducing delays and increasing capacity; (3) maintaining economic benefits provided by Lambert to the region and surrounding communities; and (4) facilitating the airline hub at Lambert. Bridgeton Appendix ("B.App.") B.App. 2:317.

In the FEIS, FAA employed a "tiering system" to screen alternatives to W-1W, St. Louis' preferred alternative, in order to select the alternatives for which a detailed environmental analysis would be performed. App. 10a-11a. Only alternatives that met the criteria of all three tiers were retained for detailed environmental analysis. *Id.*

At Tier 1, FAA considered whether each alternative met the purpose and need of the project. B.App. 2:348. FAA defined the first criterion of Tier 1 as the ability to "relieve existing and forecast runway capacity problems and reduce aircraft delay times at Lambert." B.App. 2:349. In order to satisfy this goal, FAA required alternatives to:

- Increase runway capacity to levels that will accommodate the 2015 operations forecast;

- Allow for dual simultaneous independent IFR arrival operations; and

- Substantially reduce projected aircraft delay times.

At Tier 2, FAA screened alternatives to determine whether (1) the alternative is "buildable without an overwhelming amount of potential construction concerns or interference with the ability to maintain hubbing activities at Lambert," and (2) the savings in aircraft operating costs (compared to the No-Action Alternative) exceeded the construction costs of the project. B.App. 2:350. At Tier 3, FAA evaluated the remaining alternatives to select the "best representative within each family of alternatives." B.App. 2:348.

In evaluating the eight alternatives, FAA determined that NE-1a failed to meet the Tier 1 criteria because it would not provide dual simultaneous independent IFR operation capability and had certain operational disadvantages in comparison to NE-1. B.App. 2:375. FAA did recognize, however, that NE-1a would provide substantial additional capacity and reduced delays when compared to the No-Action Alternative. B.App. 2:380.

FAA also determined that NE-1, N-1 and C-1 did not meet the Tier 2 criteria. B.App. 2:375, 383. FAA determined that W-1W, W-1E and W-2 all met Tier 1 and Tier 2 criteria, but selected W-1W as "best in family" because of the higher construction costs and environmental impacts of W-1E and

W-2. B.App. 2:377-81. FAA also determined that S-1 met the criteria of all three tiers and, thus, would be subject to a thorough environmental analysis and comparison to W-1W. B.App. 2:386.

In conducting its Section 4(f) analysis, FAA started with the premise that only W-1W and S-1 were potential prudent and feasible avoidance alternatives because S-1 and W-1W were the only alternatives that survived FAA's three-tiered NEPA alternatives analysis. FAA then evaluated W-1W and S-1 to determine if either would "use" Section 4(f) resources and concluded that both would "use" Section 4(f) resources. FAA also concluded that S-1 would "use" more acres of Section 4(f) parkland (including recreation areas) than would W-1W. B.App. 4:982, 986. FAA also determined that W-1W would "use" six Section 4(f) historic properties and that S-1 would not "use" any historic properties. B.App. 4:1010, 1012, 1042. Based on a comparison of the acreage of parkland and recreation land that each alternative would "use", FAA concluded that W-1W is the alternative that minimizes harm to the maximum extent possible to parks and recreation areas, and, thus, the project could be approved even though the construction of W-1W would result in the "use" of Section 4(f) resources. FAA reached this conclusion without regard to or consideration of the effect of W-1W or S-1 on Section 4(f) historic properties. B.App. 4:954, 1042.

On September 30, 1998, FAA issued its Record of Decision ("ROD") approving W-1W. The City of Bridgeton filed suit on October 5, 1998 challenging the ROD on the grounds that it violated NEPA, Section 4(f), and Section 509(b)(1)(A) of the Airport and Airway Improvement Act, 49 U.S.C. § 47106(a)(1).

The City of St. Louis filed a Motion to Intervene, which was denied on November 27, 1998. However, the court of appeals allowed City of St. Louis to participate as an *amicus curiae*. On or about November 4, 1998 and November 25, 1998, the City of St. Charles, Missouri and the County of St. Charles Missouri, respectively, filed a Petition for Review challenging FAA's ROD. The court of appeals, *sua sponte*, consolidated the petitions of the City of Bridgeton, the City of St. Charles and the County of St. Charles for briefing and submissions to the court.

The court of appeals granted judgment for the respondents on April 7, 2000, in a split decision. App. 1a-35a. With respect to NEPA, the court of appeals ruled that an agency's selection of alternatives is reviewable under a "rule of reason" and, so long as the agency does not define the project's purpose in terms so narrow as to make the EIS "a foreordained formality", rejection of an alternative for detailed environmental review is permissible. According to the court of appeals, FAA defined the project's purposes as, *inter alia*, to effectively and safely accommodate projected levels of aviation activity at an acceptable level of delay by increasing airfield capacity, improving visual flight rules capacity, allowing dual simultaneous independent arrivals in IFR conditions, and decreasing delays. App. 5a. Therefore, according to the court of appeals, it was not improper for FAA to exclude from detailed environmental analysis any alternative that would not provide an "element" of FAA's overall purpose of increasing airport capacity and reduce delays, e.g., dual simultaneous independent IFR arrivals capability. App. 13a-14a.

With regard to Section 4(f) of the Department of Transportation Act, the court of appeals ruled that it is

permissible to select the Preferred Alternative, i.e., W-1W, as the "least harm" alternative since that alternative will use fewer acres of parkland and wetlands than S-1 and FAA had entered into a Memorandum of Agreement with the federal Advisory Council on Historic Preservation under the National Historic Preservation Act concerning the Section 4(f) historic properties that would be "used" by W-1W. App. 24a-25a.

REASONS FOR GRANTING THE WRIT

The case presents fundamental questions concerning the restraints placed on federal agencies by the National Environmental Policy Act and the substantive restraints placed on the Department of Transportation and its constituent agencies by Section 4(f) of the Department of Transportation Act. The decision of the Eighth Circuit conflicts with the decisions of other courts of appeals. Moreover, the court of appeals' decision is contrary to a fundamental objective of NEPA — providing the governmental decision-maker with environmental analysis of all reasonable alternatives to achieving the project's purpose(s). The court of appeals' decision permits a federal agency to limit the range of alternatives analyzed under NEPA to only those alternatives that fully satisfy a definition of the project's purpose that is driven by the agency's preference for a particular means or method to achieve that purpose.

The court of appeals' ruling also is contrary to the express purpose of Section 4(f). The Eighth Circuit's ruling allows the Department of Transportation to approve a proposed project that will "use" Section 4(f) resources but that does not minimize harm to Section 4(f) resources more than each of the other alternative(s) under consideration.

The construction of the W-1W project will result not only in the destruction of several historic buildings and community and neighborhood recreation areas but also in the destruction of a stable, mature residential neighborhood in the City of Bridgeton. In addition, approximately 26% of the developable land in the City of Bridgeton would be lost and tax revenues would be impacted heavily. Thus, the construction of W-1W may be the beginning of the end of City of Bridgeton as a thriving municipality. This catastrophe is on the horizon despite the fact that there exist at least two alternatives — NE-1a and S-1 — that would satisfy the project purposes without destroying any of the communities surrounding the existing airport, without destroying several irreplaceable Section 4(f) resources, and without the loss of parks and recreational areas to serve the communities remaining after the airport is expanded.

I. THE COURT OF APPEALS' NEPA RULING CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

The Eighth Circuit's restrictive view of the range of alternatives that must be evaluated in a detailed NEPA analysis conflicts with the decisions of the Seventh and Eleventh Circuits.

A. The Seventh Circuit Has Ruled that an Alternative Is Reasonable if It Achieves the General Goals of the Project

The Seventh Circuit first in *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986) and then in *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997), ruled that the evaluation of alternatives mandated by NEPA

is an "evaluation of alternative means to accomplish the general goal of an action." *Simmons* at 669; *Van Abbema* at 638. Mindful of Section 1502.14 of the NEPA regulations, the Seventh Circuit concluded that the range of reasonable alternatives is delimited by the general goal(s) of the proposed action and not by the particular means identified by the project proponent or the federal agency to achieve those goals. *Id.*

In *Simmons*, *supra*, the City of Marion sought approval from the U.S. Corps of Engineers of a plan to dam Sugar Creek in order to provide a single source of water for the City and the Lake of Egypt Water District. In that case, the Corps only considered single-source alternatives to damming Sugar Creek. *Id.* at 669. The Seventh Circuit concluded that the Corps' alternative analysis did not comport with NEPA since it failed to analyze any otherwise potentially feasible alternatives for providing water to the two entities that were not single-source alternatives.

The majority of the Eighth Circuit panel, as FAA did in its FEIS, conflates project purposes with methods for achieving those purposes. App. 10a, 14a. The majority then compounds its error by ruling that an alternative that provides another means by which to achieve a project purpose is not "reasonable" and, thus, need not be included in the detailed analysis of alternatives.[1] App. 13a-14a. According to the

1. As the dissenting opinion points out, FAA defined the purposes of the project as increasing capacity and reducing delay at Lambert, enhancing the capacity of the National Airspace System, maintaining hub operations at Lambert and meeting regional economic goals, and FAA acknowledged in its brief that dual simultaneous independent IFR arrival capacity is one way to achieve increased capacity. App. 31a.

Eighth Circuit, the range of reasonable alternatives is defined not solely by the purposes of the project but also by FAA's preferred method for increasing capacity and reducing delay. *Id.* Thus, the Eighth Circuit endorses an approach under which federal agencies can avoid with impunity the type of rigorous analyses required by NEPA and eliminate from detailed review those alternatives that differ from the agency's preferred means for achieving the project's purpose.

The rulings of the Seventh Circuit and Eighth Circuit are irreconcilable. The Seventh Circuit has held that the evaluation of reasonable alternatives is an evaluation of alternative means to achieve the general goal of the proposed action. By contrast, in this case Eighth Circuit has ruled that it is permissible for a federal agency to eliminate from further analysis any alternative that does not embody the agency's preferred means for achieving the general goal of the proposed action.

B. The Eleventh Circuit Has Ruled that An Alternative that Will Partially Achieve the Purposes of the Proposed Action Is a Reasonable Alternative

The Eighth Circuit's view of the proper scope of NEPA alternatives analysis also conflicts with the Eleventh Circuit's view. In *North Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990), the Eleventh Circuit ruled that an agency may not eliminate an alternative from the NEPA alternatives analysis if it only partially meets the goals of the project. Although the Eleventh Circuit upheld the alternatives analysis in that case, it did so because the rejected heavy rail alternative would not reduce surface street congestion, one of the transportation goals of the project. *Id.* at 1543.

In the present case, as FAA has acknowledged, while NE-1a would not provide dual simultaneous independent IFR arrival capability, it would provide increased capacity and a reduction in delays as compared to the No-Action Alternative and achieve the other stated general purposes or goals of the proposed action. App. 31a. Nonetheless, the Eighth Circuit concluded that the exclusion of NE-1a was not arbitrary or capricious. Thus, the analytical approaches of the Eighth Circuit and the Eleventh Circuit are irreconcilable.

C. The Eighth Circuit's View of the Range of Alternatives that Must Be Evaluated Allows Agencies to Subvert the NEPA Process

NEPA's primary purpose is to ensure that federal agencies consider the environmental consequences of proposed actions before approving those actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-51 (1989). To that end, the regulations implementing NEPA establish the alternatives analysis as

> the heart of the environmental impact statement. Based on the information and analysis presented . . . it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public.

40 C.F.R. § 1502.14 (App. 40a-41a).

FAA decided whether alternatives were "reasonable" and thus should be analyzed fully based on whether the alternatives would achieve the proposed action's goals

in a particular way. NEPA " . . . expressly requires a focus on alternatives to a proposed action, including different ways of accomplishing the purpose of the action." App. 29a (R. Arnold, J., dissenting). The Eighth Circuit's ruling allows federal agencies to avoid analyzing alternatives that it or the project proponent does not prefer. As a consequence, bias will be introduced into a process heretofore viewed by this Court as providing the decision maker an unbiased assessment of alternative courses of action. *Cf. Robertson* at 349. Such an outcome is contrary to the fundamental purpose of NEPA.

II. THE EIGHTH CIRCUIT'S INTERPRETATION OF SECTION 4(f)(2) OF THE DEPARTMENT OF TRANSPORTATION ACT CONFLICTS WITH THE INTERPRETATION OF THE FIFTH AND ELEVENTH CIRCUITS

Section 4(f) of the Department of Transportation Act prohibits the Department of Transportation and its constituent agencies, such as FAA, from approving a transportation project that will use, directly or constructively, resources protected by Section 4(f) unless

1) there is no prudent and feasible alternative to using that land; and

2) the . . . project includes all possible planning to minimize harm to the [Section 4(f) resource] resulting from the use.

49 U.S.C. § 303(c). The protected resources include the publicly owned land of parks, recreation areas, and wildlife or waterfowl refuges of national, State, or local significance

and historic sites of national, State, or local significance. *Id.* As this Court observed in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971), the paramount goal of Section 4(f) is the preservation of Section 4(f) resources. Thus, an agency's obligation to minimize harm to such resources only arises if there is no prudent and feasible alternative extant that will avoid using all Section 4(f) resources.

The Eighth Circuit's interpretation of the duty imposed by Section 4(f)(2) is at odds with the interpretation of the Fifth and Eleventh Circuits.

A. The Fifth Circuit and the Eleventh Circuit Have Ruled that Compliance with Section 4(f)(2) Requires a Qualitative Analysis

According to the Eighth Circuit, FAA meets its burden to minimize harm to the maximum extent possible if it selects the alternative that will "use" the *fewest acres* of Section 4(f) resources. App. 24a. Thus, FAA may fulfill its obligation to minimize harm to protected resources to the maximum extent possible merely by totaling the acres of land that will be "used" by each alternative and selecting the alternative that "uses" the least acreage.

The Eighth Circuit's interpretation of Section 4(f)(2) is precisely the opposite of the interpretation adopted by the Fifth and Eleventh Circuits. The Fifth Circuit has ruled that Section 4(f)(2) requires the selection of the alternative that does the least harm to the affected Section 4(f) resources. *See Louisiana Environmental Society, Inc. v. Coleman*, 537 F.2d 79, 86 (5th Cir. 1976). In *Louisiana Environmental Society, Inc.*, the court of appeals remanded the matter to

Department of Transportation because no evaluation of the nature of the harm likely to be caused by each prudent and feasible alternative to the affected Section 4(f) resource had been done. *Id.*

The Eleventh Circuit in *Druid Hills Civic Ass'n v. Federal Highway Administration*, 772 F.2d 700, 716 (11th Cir. 1985) similarly has ruled that Section 4(f)(2) requires an evaluation of the harm to each Section 4(f) resource and the selection of the alternative that does the least harm. The agency must ". . . weigh the relative damage to protected properties which would result from . . . " each alternative. *Id.* at 716-17. That case was remanded to the Federal Highway Administration so that adequate findings of the impact on Section 4(f) resources caused by the proposed alternatives could be determined. *Id.*

The statutory mandate of Section 4(f) is preservation of protected resources, and if preservation is not possible, minimization of harm to the maximum extent possible. Therefore, according to the Fifth Circuit and the Eleventh Circuit, Section 4(f)(2) mandates a qualitative analysis of the harm to Section 4(f) resources in order to identify the "least harm" alternative. *See Druid Hills Civic Ass'n* at 718; *Louisiana Environmental Society* at 86. Among the factors that should be considered are the nature of the impact, the characteristics of the Section 4(f) resource, and the degree of the harm. *See Druid Hills Civic Ass'n* at 718. By contrast, the approach endorsed by the Eighth Circuit allows an agency to ignore such factors and other relevant information, such as whether any of the affected resources can be replaced, and instead to focus on how many acres will be affected. Accordingly, the rulings of the courts of appeals are irreconcilable.

B. The Eleventh Circuit Has Ruled that the Agency Must Determine if the Harm to be Caused by Each Alternative Can Be Minimized

According to the Eleventh Circuit, Section 4(f)(2) requires an agency to select the "least harm" alternative among the various prudent and feasible alternatives after taking into account all possible planning that can be done to minimize the harm to Section 4(f) resources by each alternative under consideration. *See Druid Hills Civic Ass'n* at 717. In *Druid Hills Civic Ass'n* the agency took pains to identify measures that would minimize the harm to be caused by the preferred alternative but made no similar efforts with regard to either of two alternatives. *Id.* The Eleventh Circuit concluded that based on the record before the agency it was impossible for the agency to make "the proper evaluation mandated by section 4(f)(2) of the harm caused by each of [the] options." *Id.* In order to determine which of the alternatives is the "least harm" alternative, the same consideration as was accorded the preferred alternative must be given to the other alternatives. *See Druid Hill Civic Ass'n* at 718. Thus, the court of appeals remanded the case to the agency. *Id.*

The Eighth Circuit also ruled that FAA's selection of W-1W as the "least harm" alternative was not arbitrary and capricious because FAA had entered into a Memorandum of Agreement ("MOA") under the National Historic Preservation Act, 16 U.S.C. §§ 470-470w-6 (1994), with the federal Advisory Council on Historic Preservation and the Missouri State Historic Preservation Officer ("SHPO"). App. 25a. Pursuant to the MOA, FAA agreed "to consult with the SHPO and the Council to seek ways to reduce the adverse effects on [five of the] historic properties

through such measures as relocation and reuse." B.App. 4:1309. If relocation is impossible, the structures will be destroyed. *Id.*

FAA did not consider in its Section 4(f)(2) analysis any measures that it could take to minimize the harm S-1 would cause to parks and recreation areas. However, FAA noted that several of the Section 4(f) parks and recreation areas that would be used by W-1W were built or acquired with monies provided under Section 6(f) the Land and Water Conservation Fund Act, 16 U.S.C. § 4601-4 *et seq.* Such properties may be converted to another use if replacement properties are provided. *Id.* As part of the mitigation for the W-1W project, FAA began the process of identifying replacement properties for the parks and recreation areas that would be used by W-1W before the NEPA Record of Decision was signed. B.App. 5:1560.

Despite the fact that FAA did not subject S-1 to the same caliber of treatment as W-1W in terms of identifying ways to minimize the harm caused by S-1, the Eighth Circuit ruled that FAA's selection of W-1W as the "least harm" alternative was not arbitrary or capricious. The ruling of the Eighth Circuit is irreconcilable with the Eleventh Circuit's ruling.

C. The Eighth Circuit's Interpretation of Section 4(f)(2) Allows an Agency to Avoid Its Statutory Duty to Minimize Harm

Section 4(f)(2) imposes on FAA the duty to utilize all possible planning to minimize harm to Section 4(f) resources before it can approve a project that will use Section 4(f) resources. *See Druid Hills Civic Ass'n* at 716. The Eighth Circuit has endorsed an approach that allows an agency to

avoid its statutory duty with impunity. More importantly, the approach endorsed by the Eighth Circuit will result in harm to protected resources that could be avoided or minimized significantly. Such an outcome is completely contrary to the Congressional intent expressed in Section 4(f). *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971).

CONCLUSION

The petition for a writ of certiorari should be granted to resolve the conflict in the circuit courts concerning the application of NEPA and the obligations of the Department of Transportation and its constituent agencies under Section 4(f).

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED APRIL 7, 2000

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3506
No. 98-3774
No. 98-3925

City of Bridgeton; City of St. Charles;
St. Charles County,

Petitioners,

v.

FAA; Rodney E. Slater, in his official capacity as Secretary of Transportation; Jane F. Garvey, in her official capacity as FAA Administrator; John E. Turner, in his official capacity as FAA Regional Administrator,

Respondents.

Petitions for Review of the Decision of the
Federal Aviation Administration.

Submitted: September 15, 1999

Filed: April 7, 2000

Appendix A

Before RICHARD S. ARNOLD, FLOYD R. GIBSON, and LOKEN, Circuit Judges.

LOKEN, Circuit Judge.

Two cities and a county located to the west of Lambert-St. Louis International Airport petition for review of a decision by the Federal Aviation Administration approving and authorizing federal funding for a proposed westward expansion of the Airport. Judicial review is authorized by the FAA Authorization Act of 1994, 49 U.S.C. § 46110. Petitioners argue the decision violates the National Environmental Policy Act, 42 U.S.C. §§ 4231 *et seq.* (NEPA); § 4(f) of the Transportation Act, 49 U.S.C. § 303(c); and the consistency and notice provisions of the Airport and Airway Improvement Act of 1982, 49 U.S.C. §§ 47106(a)(1) and (c)(1). Having given the FAA's decision and the administrative record the thorough, probing, but deferential review required by *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414-15 (1971), and other cases, we conclude the FAA's decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Accordingly, we deny the petitions for review.

I. Background

Located some twelve miles northwest of downtown St. Louis, Lambert is one of the nation's busiest and most delay-ridden airports. Lambert's importance to the National Airspace System is well-documented. In 1996, it ranked fourteenth nationally in terms of passengers enplaned and

deplaned, and eighth in terms of aircraft operations. All of the nation's major commercial airlines serve Lambert, and Trans World Airlines uses Lambert as its primary connecting hub. Lambert is also important to the region's economy. Its proximity to St. Louis makes it accessible to the metropolitan area's 2,500,000 residents, and Lambert-related activity is estimated to provide $5 billion annually for the St. Louis region.

Local planners and the FAA have long explored alternatives for expanding Lambert's capacity and reducing air traffic delays. Lambert's delay problems stem primarily from its inadequate take-off and landing facilities. For decades, Lambert has relied on two parallel northwest/southeast runways, denominated 12L/30R and 12R/30L, to handle the bulk of its commercial traffic. Because only 1,300 feet separate the centerlines of the two runways, Lambert's air traffic controllers cannot conduct independent simultaneous arrival operations in adverse weather conditions.[1] Consequently, when bad weather precludes the use of visual flight rules (about six percent of the year in St. Louis), Lambert becomes not much better than a one-runway arrival operation, causing average per-operation delays to exceed seventy minutes. Lambert's ineffective functioning during inclement weather often disrupts the flow of air traffic nationwide.

The City of St. Louis owns Lambert and is the sponsor of the project at issue. The airport operator, the St. Louis

1. FAA rules currently require a minimum lateral separation of 4,300 feet for such operations, or 3,400 feet if the airport is equipped with a precision runway monitor.

Airport Authority, has been exploring options to expand runway capacity for over ten years. Between 1989 and 1993, St. Louis sponsored a comprehensive study resulting in an airport development plan called Alternative F-4, which called for building four new parallel runways on the site of runways 12L/30R and 12R/30L. Subsequent analysis revealed, however, that construction of the new runways would jeopardize Lambert's ability to function as a hub and would cost significantly more than originally anticipated. Consequently, St. Louis again studied numerous options. From nine alternatives representative of this universe, St. Louis selected a proposal known as Alternative W-1W, which entails the construction of a new 9,200-foot runway parallel to and to the west of existing runways 12L/30R and 12R/30L. The negative impacts of this expansion — primarily noise and the need to acquire property presently devoted to other uses — will fall most heavily on the City Bridgeton, which lies immediately to the west of Lambert, and to a lesser extent on the City of St. Charles and St. Charles County.

St. Louis applied to the Department of Transportation for federal funding of Alternative W-1W. The FAA undertook an independent review of the project, announcing that it would prepare an environmental impact statement for the proposed Lambert expansion. The FAA spent more than two years analyzing the preferred expansion plan and several alternatives, holding public meetings and responding to thousands of public comments. After issuing a Final Environmental Impact Statement (FEIS) in December 1997, the FAA held meetings with various parties. The agency received both positive and negative comments about the

project and its review process. On September 30, 1998, the FAA issued its Record of Decision approving federal assistance for the W-1W project. Bridgeton, St. Charles, and St. Charles County timely petitioned for judicial review of this final agency action.

II. The Record of Decision

The FAA's Record of Decision properly includes the findings required by the relevant federal statutes and regulations, and it concludes with a formal FAA Approval and Order. But the document also provides a detailed 125-page account of the process by which the FAA reviewed and ultimately approved the W-1W project. After recounting the history of Lambert airport and briefly summarizing the development process, the Record of Decision sets out the purpose and need for the Lambert expansion to provide "the primary foundation for the identification of reasonable alternatives and the evaluation of the impacts of the development." The articulated purposes of the expansion project are (1) "to effectively and safely accommodate projected levels of aviation activity at an acceptable level of delay" by increasing airfield capacity, improving visual flight rules capacity, allowing dual independent simultaneous arrivals in bad weather conditions, and decreasing delays; (2) to enhance the National Airspace System by increasing capacity and reducing delays; (3) to maintain Lambert's importance to the economic vitality of the St. Louis region; and (4) to facilitate an airline hub at St. Louis.

The Record of Decision next explains how the FAA selected and analyzed alternatives to the proposed action,

noting that the FAA does not "control or direct the actions and decisions of St. Louis relative to planning," but has authority to withhold funding for and federal approval of the project based upon its own independent review. Here, the FAA explored alternatives that ranged from "No Action," to investing in a high-speed rail line, to constructing a new airport at another location. The Record of Decision concludes that the "No Action" alternative would not achieve the purposes and needs of the proposed expansion and indeed would be less desirable than Alternative W-1W from the standpoint of certain environmental impacts such as air emissions. Building a new airport elsewhere or a high-speed rail line likewise would not achieve the project's purposes and needs.

The Record of Decision then turns to the task of selecting which runway expansion alternatives were appropriate for detailed environmental and operational evaluation in the FEIS. For this task, the FAA employed a three-tiered evaluation process based upon the aforementioned statement of purpose and need. The Record of Decision explains the three-tiered analysis (discussed in Part III.A. of this opinion) and briefly explains how this analysis resulted in detailed consideration of two expansion alternatives, S-1 and W-1W, and the No Action alternative, X-1.

The Record of Decision then summarizes the FAA's detailed consideration of alternatives W-1W and S-1, which proposed a new parallel runway to the south of the airport terminal and existing runways. Both alternatives would achieve substantial annual cost savings, though S-1 would cost more to build. S-1 would be "superior [to W-1W] from

an [airport] operational standpoint," but the FAA concluded that S-1's more severe environmental and socio-economic impacts tilt the balance in favor of W-1W. S-1 would require the relocation of 9,725 people; W-1W only 5,680 people (concentrated in the City of Bridgeton). S-1 would force the relocation of 210 businesses; W-1W only 75. S-1 would directly affect fifty-seven acres of parkland; W-1W only twenty-six acres. After carefully weighing these many factors, the FAA decided to approve the operationally less desirable W-1W because the agency agreed with St. Louis it was "the least impacting alternative overall."

Next, the Record of Decision summarizes the twenty-two distinct impacts associated with implementing the W-1W runway project, and their planned mitigation. This section discusses the expansion's impacts on noise levels, air emissions, water quality, historical and archaeologically significant properties, parks, wetlands, in addition to various social impacts. Mitigation measures adopted include sound insulation or sales assistance for homeowners adversely affected by increased noise; relocation assistance to residents who must move; collection and recycling of aircraft deicing fluids to prevent runoff into local waterways; and identification of land suitable for replacing parks and wetlands affected by the project. St. Louis has primary responsibility for these mitigation efforts, but the FAA will oversee their implementation.

Finally, the Record of Decision contains lengthy summaries of the FAA's efforts to keep the public apprised of and involved in the process; the agency's work with other federal agencies, including the Environmental Protection

Agency (EPA), the Air Force and Navy, the U.S. Army Corps of Engineers, and the Federal Highway Administration; and the involvement of state and local agencies and concerned private organizations such as the Air Line Pilots Association and the National Air Traffic Controllers Association. The Record of Decision summarizes and responds to concerns and criticisms raised in the many public comments. In the section entitled "Environmental Issues Raised about the FEIS," the FAA responds to criticisms leveled at the agency's environmental analysis. This section also contains an extensive discussion of the noise impacts, the mitigation program, and specific complaints.

III. NEPA Issues

NEPA requires that a federal agency prepare an FEIS whenever it recommends a "major federal action[ ]" that will "significantly affect[ ] the quality of the human environment." 42 U.S.C. § 4332(C). NEPA's requirements are more procedural than substantive. Preparation of an FEIS forces the agency to take a "hard look" at environmental consequences and to inform the public that environmental concerns have in fact been considered. But NEPA does not mandate particular agency decisions, and accordingly judicial review under NEPA is limited to ensuring "that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97-98 (1983); *see Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The reviewing court is not empowered "to substitute [its] judgment for that of the agency." *Friends of*

Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115, 1128 (8th Cir. 1999).

A. The Environmental Analysis of Reasonable Alternatives. The principal issue on appeal is petitioners' contention that the FAA violated NEPA's mandate that the FEIS include a suitable discussion of alternatives to the proposed action. *See* 42 U.S.C. § 4332(C)(iii). The Council on Environmental Quality's implementing regulations provide that an agency's FEIS must "[r]igorously explore and objectively evaluate" all reasonable alternatives, but it need only "briefly discuss" the reasons why other alternatives were eliminated from more detailed study. 40 C.F.R. § 1502.14. This standard recognizes that a detailed statement of alternatives cannot as a practical matter "include every alternative device and thought conceivable by the mind of man." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978). We review an agency's selection of the alternatives to be fully discussed in an FEIS under a "rule of reason." *See Boundary Waters*, 164 F.3d at 1128; *accord City of Aurora v. Hunt*, 749 F.2d 1457, 1467 (10th Cir. 1984); *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426, 432 (10th Cir. 1996).

Drawing on previous studies, the FAA examined the eight Lambert expansion alternatives considered by St. Louis, plus a no-action alternative and off-site options such as expansion of the Scott Air Force Base airport in southern Illinois. The FAA used a three-tiered screening process to identify those runway expansion alternatives that would meet the project's purpose and need and therefore should be

included in the FEIS's detailed environmental analysis. It grouped the eight runway alternatives into "families" of related options based on their direction from the existing runways. The north family, called N-1, NE-1, and NE-1a, proposed some form of runway expansion to the north of the existing parallel runways. The west family, W-1W, W-1E, and W-2, proposed a new parallel runway west of the existing runways, while Alternative S-1 proposed a new parallel runway to the south, across Interstate Highway 70. Alternative C-1, called the "canted" alternative, resembled the Alternative F-4 plan that St. Louis had initially rejected; it proposed three new parallel runways on the site of the existing two.

To satisfy the FAA's Tier 1 analysis, an alternative had to fulfill basic operational goals of the proposed federal action — increase airfield capacity, reduce delay time, support independent simultaneous arrival capability in poor weather, enhance the capacity of the National Airspace System, maintain a passenger hub airport in St. Louis, and meet the economic goals of the region. Alternative NE-1a and the off-site options failed this Tier 1 analysis. At Tier 2, the FAA examined whether the remaining alternatives would meet constructibility and benefit/cost parameters. To be constructible, an alternative had to be "buildable without an overwhelming amount of potential construction concerns or interference with the ability to maintain hubbing activities." To clear the benefit/cost hurdle, an alternative's capacity-enhancing benefits had to outweigh its construction costs. Alternatives N-1, NE-1, and C-1 were eliminated at Tier 2. At Tier 3, the FAA compared the western family of alternatives against a broad range of economic,

environmental, and operational factors and selected Alternative W-1W as the best plan from that family. Thus, Alternatives S-1, W-1W, and the no-action option survived the three-tier screening and were subjected to detailed environmental analysis in the FEIS.

Petitioners contend that all the northern alternatives and a Modified S-1 alternative were "reasonable" within the meaning of 40 C.F.R. § 1502.14(a) and therefore should have been included in the FEIS's detailed environmental analysis. To assess the merits of this contention, we must more closely examine the FAA's three-tiered analysis of those alternatives. An alternative that does not accomplish the purpose of the project in question is *un*reasonable and does not require detailed attention in the FEIS. *See City of Richfield v. FAA*, 152 F.3d 905, 907 (8th Cir. 1998).

1. Alternative N-1. N-1 called for the construction of two new parallel runways separated by a lateral distance sufficient to support independent simultaneous bad weather arrivals. In the first stage, N-1 proposed construction of a 9,000 foot runway 1,200 feet north of the existing northern runway (12L/30R), on the site of a McDonnell Douglas (now Boeing) aircraft factory that would be relocated at a cost of several hundred million dollars. Next, N-1 proposed what we will term a runway-terminal shift, which involved decommissioning the southern parallel runway (12R/30L), constructing a new terminal in its place, demolishing the current terminal, and constructing a second new runway where the present terminal stands. The end result would be three parallel runways, with the northernmost and southernmost at least 3,500 feet apart, thereby meeting the FAA's improved bad weather capacity objective.

The FAA determined that the cost of Alternative N-1 would exceed the value of its capacity-related benefits, largely because of the need to relocate the McDonnell Douglas facility. The FAA rejected N-1 after Tier 2 analysis because its costs exceed its anticipated benefits, and because the need to decommission one runway, demolish the existing terminal, and build a new terminal make it doubtful Lambert would remain a hub during construction. Petitioners do not make a lengthy case for N-1, and rightly so. We conclude the FAA reasonably eliminated Alternative N-1 from detailed consideration because of its high cost and constructibility concerns. *See Airport Neighbors*, 90 F.3d at 432 (upholding the FAA's summary rejection of an alternative requiring the relocation of two Air Force facilities).

2. Alternative NE-1. NE-1 avoided the cost of relocating the McDonnell Douglas facility by shifting the new northern runway 2,000 feet to the southeast. However, NE-1 included the runway-terminal shift, with its attendant constructibility problems. The FAA eliminated NE-1 after Tier 2 analysis, explaining that its bad weather capability benefits "would not be realized until 2008 or 2009," and its elaborate construction plan "would be disruptive to the operations of the airport to such a degree that it could create a major interference with hubbing operations for several years, perhaps even to the extent that airlines would move to another hub location." The FAA's conclusion regarding NE-1 paralleled that of the St. Louis airport consultant, who also determined that NE-1 presented constructibility concerns.

Petitioners characterize the FAA's reasoning as "mere assertions" and unsupported "speculation" that cannot

withstand NEPA scrutiny. This contention conflicts with the requirement that an agency "briefly discuss" rejected alternatives. 40 C.F.R. § 1502.14(a). By pointing out the delayed capacity benefits and the likelihood that wholesale reconstruction of the airport terminal would seriously interfere with hubbing operations, the FAA provided a logical explanation for its decision to reject NE-1 as an unreasonable alternative. Thus, the FAA's rejection of NE-1 easily passes muster under our "rule of reason" standard of review.

3. Alternative NE-1a. NE-1a is essentially the first phase of NE-1, consisting of only the addition of the northern runway proposed in NE-1. Thus, NE-1a avoids both the relocation of the McDonnell Douglas facility and the runway-terminal shift — the cost and constructibility factors that led the FAA to eliminate N-1 and NE-1. However, by not relocating the terminal and the more southern of the two existing runways, NE-1a fails to provide independent simultaneous arrival capacity in bad weather. Therefore, the FAA eliminated Alternative NE-1a after Tier 1 analysis because it would not satisfy a significant purpose of the project.

In challenging the elimination of NE-1a from detailed environmental analysis, petitioners argue the FAA "imposed an improperly narrow definition of purpose and need" by including the independent simultaneous bad weather arrivals requirement. Petitioners further complain that NE-1a would have increased Lambert capacity and reduced delay, and the FAA therefore had an inadequate basis for rejecting NE-1a as a reasonable alternative to W-1W and S-1. We disagree. In the FEIS, the agency explained why it chose the

independent simultaneous arrivals capability as a critical element of its overall purpose to increase airport capacity and reduce delays:

> In general, runway capacity problems at airports can usually be most improved by the construction of another parallel runway. Aircraft delays can be reduced by the construction of a parallel runway at a sufficient spacing, centerline-to-centerline, that allows for dual simultaneous Instrument Flight Rules (IFR) operations, that is, multiple arrivals, departures or a combination of both occurring at the same time during adverse weather conditions.

This logical criterion has been applied by the FAA in rejecting other airport expansion alternatives as infeasible. *See Airport Neighbors*, 90 F.3d at 432 & n.6. Moreover, the FAA's general preference for independent simultaneous arrivals capability was supported in this case by data showing that the average annual delay, based on the projected level of Lambert operations in 2015, would be 10.4 minutes per operation for NE-1a, compared to 4.7 minutes per operation for W-1W and 2.5 minutes per operation for S-1. Because the worst delays typically occur in bad weather, this average annual data understates the increased delays NE-1a would incur during bad weather. For example, a Capacity/Delay Analysis submitted by St. Louis to Congressman James Talent projected average peak-hour bad weather delays of 78.8 minutes per operation for Alternative NE-1a, versus 25.5 minutes per operation for Alternative W-1W. This data led the FAA to conclude that NE-1a is essentially a short-term

strategy whose delay-reducing limitations would require St. Louis to begin planning for additional runway construction and land acquisition "long before the year 2015."

In reviewing the FAA's selection of FEIS alternatives, we properly look at whether the agency defined the project's purpose in terms so unreasonably narrow as to make the FEIS "a foreordained formality." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991); *see Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997). But we may not dictate to the FAA how much capacity increase and delay reduction it must accept as the minimum airport operational improvement which will justify a project of this expense and magnitude. At the time the FAA selected the alternatives to be given detailed analysis in the FEIS, its extensive experience in airport operations and the data evaluating the possible alternatives for expanding Lambert's operational capacity justified the requirement that the project include independent simultaneous IFR arrivals capacity in bad weather. Therefore, the elimination of NE-1a satisfies our rule-of-reason alternatives review.[2]

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2. Petitioners also challenge the FAA's conclusion that W-1W will allow for simultaneous independent bad weather arrivals, and they criticize the agency for failing to perform a so-called "real-time" study to determine whether W-1W will operate as projected. These arguments invite us to second guess the substantive merits of the FAA's decision to approve Alternative W-1W. Such contentions are not cognizable under NEPA. *See Stryckers Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-28 (1980) (per curiam). To

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4. Alternative Modified S-1. In late 1996, the Air Line Pilots Association submitted a revised version of a prior Modified S-1 plan. This version shifted the new southern runway proposed by S-1 substantially to the west. The Association argued this new alternative was superior to either S-1 or W-1W, and urged the FAA to include Modified S-1 in the detailed FEIS environmental analysis. After the Association and FAA exchanged drawings and correspondence clarifying the location of the new runway proposed in Modified S-1, the FAA rejected this alternative for detailed analysis because "it is not better than the alternative we are including in the EIS (S-1). The Association compares their newest proposal to S-1 when it suits them and compares it to W-1W when it suits them. If we were to take any of the alternatives and begin to shift their location slightly, then we could be faced with an infinite number of alternatives to analyze." On appeal, St. Charles County argues that the FAA was capable of fleshing out the specifics of the Modified S-1 plan and was required to do so. We disagree. An agency is not required to consider alternatives that are so lacking in specificity as to be remote or speculative. *See Olmsted Citizens for a Better Community v. United States*, 793 F.2d 201, 209 (8th Cir. 1986). Here, the Association provided some details for its eleventh-hour modified alternative. FAA took a hard look at that information and concluded that Modified S-1 did not warrant detailed analysis in the FEIS because it was not a better alternative than S-1, the southern

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(Cont'd)
the extent we have jurisdiction under the Administrative Procedure Act to review the merits of the FAA's decision, we conclude the agency action was not arbitrary or capricious. *See Boundary Waters*, 164 F.3d at 1129-30.

alternative that had been selected for detailed analysis. This was a reasonable basis for excluding Modified S-1 from the FEIS.

To summarize, NEPA requires that federal agencies take a "hard look" at a contemplated major federal action's environmental consequences prior to taking that action. *See Baltimore Gas & Elec.*, 462 U.S. at 97. In this case, after reasonably selecting the alternatives to be analyzed in detail, the FAA prepared an FEIS comprising several hundred pages of findings, analysis, and correspondence with interested parties and government agencies. The FEIS devotes more than two hundred pages to a comparison of the environmental impacts of Alternatives W-1W, S-1, and X-1, the three alternatives considered in detail. In the Record of Decision, the FAA briefly discussed why the other runway expansion alternatives were eliminated from detailed consideration, and it specifically addressed twenty-two distinct kinds of impacts. NEPA requires no more.[3]

B. Evaluation of Noise Impacts. The St. Charles petitioners argue the FEIS is inadequate because it fails to address the adverse impact of the increased aircraft overflight noise that Alternative W-1W will entail, particularly on the City of St. Charles's historic properties and activities. We disagree.

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3. After the FAA and the EPA exchanged comments concerning the FEIS, the EPA advised: "With the additional clarification provided in your letter of April 9, 1998, we better understand how FAA conducted the tiered alternatives screening, and believe that the analysis of alternatives, based on the particular purpose and needs identified for this project, represents an adequate screening of the alternatives consistent with the requirements of NEPA."

NEPA requires that the FEIS's detailed environmental analysis of Alternative W-1W include a discussion of adverse environmental consequences and of measures to mitigate those consequences. *See* 40 C.F.R. §§ 1502.14-.16. Applying the methodology approved in its Part 150 Noise Compatibility Program, which we discuss in greater detail in Part IV of this opinion, the FAA determined that the St. Charles petitioners (City and County) lie outside the sixty-five decibel (65 dB) noise contour, the point at which aircraft noise level is considered compatible with all land uses. Having determined that St. Charles will be below 60 dB, including all noise from the expanded airport, the FAA concluded that "further evaluations of aviation noise impacts, such as speech interference and sleep deprivation effects, in St. Charles were not deemed necessary for the FEIS."

St. Charles County disputes the FAA's noise measurement findings, arguing its own week-long study in early 1996 showed an average day-night noise level of 63.6 dB. The FAA's standard measures yearly not weekly average noise levels. The agency, not a reviewing court, "is entrusted with the responsibility of considering the various modes of scientific evaluation and theory and choosing the one appropriate for the given circumstances." *Sierra Club v. United States DOT*, 753 F.2d 120, 129 (D.C. Cir. 1985). We decline to second-guess the FAA's noise level findings.

Similarly, the St. Charles petitioners fault the FEIS for failing to measure whether there will be aircraft-induced speech interference with historic events in St. Charles, such as Goldenrod Showboat programs and festivals in Frontier Park. Petitioners argue the FEIS was required to consider

these single-event noise impacts.[4] However, courts have consistently upheld the FAA's discretion to choose its cumulative noise impact methodology instead of single-event noise analysis. *See Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 578-79 (9th Cir. 1998), and cases cited. Congress has instructed the agency to establish a single system of noise measurement capable of uniform application. *See* 49 U.S.C. § 47502. The FAA's methodology was developed with the assistance of federal environmental agencies and has been upheld in numerous court decisions such as *Seattle Comm. Council Fed. v. FAA*, 961 F.2d 829, 833 (9th Cir. 1992). We conclude the FAA's analysis of noise impacts and their mitigation complied with NEPA.

IV. Transportation Act § 4(f) Issues

A. Section 4(f) of the Transportation Act, 49 U.S.C. § 303(c), requires that the FAA take certain measures if it determines that a transportation project will "use" natural and historic resources protected by the statute. The St. Charles petitioners argue that the FAA's decision violates § 4(f) because the noise impacts of Alternative W-1W will constitute a use of St. Charles's unique Historic District. The FAA rejected this contention because the Goldenrod Showboat and Frontier Park lie outside the 65 dB noise

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4. As petitioners note, the Environmental Protection Agency initially urged the FAA to measure single-event noise impacts both inside and outside the 65 dB contour. But after the FAA responded, defending its "comprehensive analysis of noise impacts," the EPA replied that its comments "should not be viewed as questioning whether the FEIS met the spirit, intent, and requirements of [NEPA]."

contour and therefore will not be significantly impacted by the project.

Although noise can constitute a "use" for § 4(f) purposes, no use occurs "where an action will have only an insignificant effect on the existing use of protected lands." *Allison v. Department of Transp.*, 908 F.2d 1024, 1028 (D.C. Cir. 1990). The FAA's guidelines for determining significant noise impact are found in the Part 150 Noise Compatibility Program, 14 C.F.R. §§ 150 *et seq.* These guidelines were developed to satisfy the mandate that the agency "establish a single system of measuring noise" that can be uniformly applied at airports and surrounding areas. 49 U.S.C. § 47502(1). In brief, the regulations require airport operators to measure in decibels the yearly day-night average noise level (symbolized as L_{dn}) at various points near the airport.[5] The operator drafts a noise contour map, connecting points of equal noise exposure. The regulations require contour lines marking 65, 70, and 75 L_{dn} and anticipate that additional contour lines may be appropriate. *See* 14 C.F.R. § 150, app. A, part B, § A150.101. The operator identifies the uses to which land within the 65 L_{dn} contour is put and uses Part 150's land use compatibility table to determine whether each land use is compatible with the noise level to which it will be exposed. For instance, the table provides that an L_{dn} of 65-70 dB is incompatible with the operation of a school.

The land use compatibility table provides that all the listed categories of use are compatible with an L_{dn} below

5. The L_{dn} analysis adds a 10 dB penalty to events measured between the hours of 10 p.m. and 7 a.m. because nighttime noise is particularly irksome.

65 dB "without restrictions." The "implicit conclusion" is that an average noise level below L_{dn} 65 dB would not amount to a "use" of any property whose protected use is fairly encompassed by the compatibility table. *Allison*, 908 F.2d at 1029; *accord City of Grapevine v. Department of Transp.*, 17 F.3d 1502, 1507-08 (D.C. Cir.), *cert. denied*, 513 U.S. 1043 (1994); *Communities, Inc. v. Busey*, 956 F.2d 619, 623-25 (6th Cir.), *cert. denied*, 506 U.S. 953 (1992). Therein lies the basis of the St. Charles attack. The FAA's reliance on its Part 150 analysis is flawed, petitioners argue, because the St. Charles Historic District is a protected use unlike any of the uses set forth in the Part 150 compatibility table. There is support for this theory in *Allison*, 908 F.2d at 1029, where the court concluded that the impact of noise on the kinds of land uses listed in Part 150 "bears little or no relation to the effect of noise" on a wildlife refuge, and further support in dicta in *Grapevine*, where the court posited that the L_{dn} 65 dB standard might not adequately protect an historic village "preserved specifically in order to convey the atmosphere of rural life in an earlier (and presumably a quieter) century," 17 F.3d at 1508.

The problem with the theory in this case is that St. Charles's Historic District is not a wildlife refuge or a rustic village. Its uses do find reasonable parallels in the Part 150 compatibility table, for example, the subcategories for auditoriums, concert halls, outdoor music shells, amphitheaters, nature exhibits, zoos, parks, resorts, and golf courses. The FAA does not deny that the Historic District's cultural events, musical festivals, and historic floating theater are worthy of § 4(f) protection. But the agency notes that the District is located just off Interstate 70, permits automobile traffic on

its one main street, and includes numerous bars, restaurants, and retail shops. We conclude the FAA was not arbitrary and capricious in applying its Part 150 analysis to determine that Alternative W-1W will not constitute a § 4(f) use of the St. Charles Historic District.

B. The City of Bridgeton raises different § 4(f) issues, arguing the FAA violated the statute in approving Alternative W-1W because of the parks and historic properties in Bridgeton that will be destroyed or constructively used by this airport expansion.

1. Section 4(f)(1) provides that the FAA may not approve a transportation project that will use a public park or historic site unless there is no "prudent and feasible alternative to using that land." 49 U.S.C. § 303(c)(1). Bridgeton attacks the FAA's reliance on its NEPA alternatives analysis in concluding that Alternatives N-1, NE-1, NE-1a, and C-1 are not prudent and feasible alternatives to the use of protected § 4(f) resources which Alternative W-1W will entail. In reviewing this contention, we must determine whether the Secretary "reasonably believed that . . . there are no feasible alternatives or that alternatives do involve unique problems." Applying the arbitrary and capricious standard of review, we "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 416.

The alternatives analyses under NEPA and § 4(f) are not precisely the same — "an alternative is imprudent under section 4(f)(1) if it does not meet the *transportation* needs

of a project." *Burlington*, 938 F.2d at 203. However, the analyses are similar in that "an alternative that does not effectuate the project's purposes is, by definition, unreasonable," and need not be evaluated in detail under § 4(f). *Ringsred v. Dole*, 828 F.2d 1300, 1304 (8th Cir. 1987). In this case, as we have explained, the FAA eliminated Alternatives N-1, NE-1, NE-1a, and Alternative C-1 because they would not meet the project's transportation purposes and needs — increased capacity, reduced delays, and continued hubbing. Thus, the agency reasonably concluded these were not feasible and prudent alternatives for § 4(f) purposes.

2. The FAA determined that both of the feasible and prudent alternatives, S-1 and W-1W, will use § 4(f) resources. In this situation, a project must "include[ ] all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use." 49 U.S.C. § 303(c)(2). In reviewing an agency's choice among feasible and prudent alternatives, we again apply the arbitrary and capricious standard of review. *See Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686, 694 (3rd Cir. 1999).

Bridgeton argues the FAA was arbitrary and capricious in selecting W-1W over S-1 because S-1 is the less harmful alternative. We disagree for a number of reasons. First, while § 4(f)(2) surely requires the FAA to make a comparative § 4(f) analysis when there are multiple feasible alternatives, we doubt whether the statute mandates a rigid least-harm standard in airport expansion cases. Such a reading might well conflict with the congressional mandate "that airport

construction and improvement projects that increase the capacity of facilities to accommodate passenger and cargo traffic be undertaken to the maximum feasible extent so that safety and efficiency increase and delays decrease." 49 U.S.C. § 47101(a)(7).

Second, the FAA did an extensive comparative § 4(f) analysis and concluded that Alternative W-1W will have less impact on parks and wetlands than Alternative S-1 (36 acres versus 68 acres directly affected). Bridgeton quarrels unpersuasively with these findings, arguing the FAA gave parks in the communities affected by S-1 *too much* protection by presuming that all parks are significant despite the absence of a declaration to that effect by the relevant local authority referred to in 49 U.S.C. § 303(c). This contention is without merit. It is perfectly appropriate, indeed environmentally sound, for the FAA to presume that "land used as a public park is . . . 'significant' unless explicitly determined otherwise." *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1335-36 (4th Cir.), *cert. denied*, 409 U.S. 1000 (1972) (reversing the Secretary for presuming otherwise).

Bridgeton criticizes the FAA for treating § 4(f) resources as fungible, thereby placing undue emphasis on easily replaceable neighborhood parks and not enough emphasis on the five irreplaceable historic sites that lie in the path of Alternative W-1W's construction. The various studies in the record confirm that W-1W would affect historic sites in Bridgeton, while S-1 would have a greater impact on parks in other communities. However, the FAA did far more than merely total up the acres and make a superficial § 4(f)(2) decision. The agency catalogued in detail the nature of each

property that would be affected under both alternatives. It discussed each site's location, its size, its function, its significance, the activities associated with it, and the degree to which it would be adversely affected. And most significantly, the agency developed detailed plans to avoid, reduce, or mitigate adverse § 4(f) impacts, including, with regard to historic properties, a Memorandum of Agreement with interested parties such as the Missouri State Historic Preservation Officer and the Advisory Council on Historic Preservation. (Bridgeton declined to enter into that Agreement.)

FAA selected W-1W as its preferred alternative, despite S-1's operational advantages, in large part because W-1W was environmentally superior and had "less severe impacts on resources protected under special purpose laws," including § 4(f). Our review of the record reveals that the FAA based this decision on the relevant factors and an appropriate § 4(f) analysis. The decision was not arbitrary or capricious.

V. Airport and Airway Improvement Act Issues

A. Consistency Requirement. The Improvement Act provides that the FAA may only approve an application for federal funding of an airport project if "the project is consistent with plans (existing at the time the project is approved) of public agencies authorized by the State in which the airport is located to plan for the development of the area surrounding the airport." 49 U.S.C. § 47106(a)(1). Alternative W-1W is not consistent with Bridgeton's development plans. Therefore, Bridgeton argues, the project may not go forward because the statute mandates that an

airport expansion plan be consistent with the development plans of every public agency that has planning authority over any portion of the land surrounding the airport. We disagree.

In making its consistency determination, the FAA relied primarily on the endorsement of the East-West Gateway Coordinating Council, a regional planning commission charged with "making a comprehensive plan for the development of the region." Reliance on the approval of such an overseeing agency was upheld in *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 199 (7th Cir.), *cert. denied*, 479 U.S. 847 (1986). *Suburban O'Hare* was decided under a predecessor statute which required that the project be "reasonably consistent" with local agency plans. Pub. L. No. 88-280, § 8(e), 78 Stat. 158, 160-61 (1964). The legislative history of this earlier provision explicitly recognized that planning inconsistencies are inevitable, that the statute was "not intended to require that all Federal aid be withheld until all local area development plans are in harmony," and that in cases of conflict "the granting of aid would depend upon the Administrator's appraisal of all relevant facts." H. REP. No. 88-1002, *reprinted in* 1964 U.S.C.C.A.N. 2063, 2067-68.

In the 1994 recodification of this provision, Congress omitted the word "reasonably," a change described as eliminating surplus. *See* 49 U.S.C.A. § 47106 Historical and Statutory Notes, at p.660 (West 1997). No intent to change the effect of the statute was clearly expressed. *See Finley v. United States*, 490 U.S. 545, 554 (1989). Therefore, based upon the earlier legislative history and the decision in *Suburban O'Hare*, we reject Bridgeton's contention that the interests of the National Airspace System may be held

hostage to the conflicting plans of a single local community, when the relevant metropolitan or regional planning agency or agencies have approved. The FAA's consistency determination was not arbitrary or capricious.[6]

B. Sponsor certification. St. Charles County asserts that the FAA's Record of Decision violates the requirement that the project sponsor certify it has advised "the communities in which the project is located . . . they have the right to petition the Secretary." 49 U.S.C. § 47106(c)(1)(A)(ii). However, the W-1W project will not extend into St. Charles County, so the County has no standing to raise this claim. *See Bennett v. Spear*, 117 S. Ct. 1154, 1161-62 (1997). St. Louis did inform Bridgeton of its right to petition and informed the FAA that it had provided such notice.

The petitions for review are denied. The FAA's motion to strike the City of Bridgeton's January 18, 2000, submission under Eighth Circuit Rule 28(j), and the City of Bridgeton's motion for leave to file a supplemental brief, are denied.

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6. The question whether Bridgeton's zoning regulations apply to the Lambert expansion project is currently pending before a Missouri appellate court. This litigation may affect the ability of St. Louis as airport operator to implement the project, but it does not affect the FAA's decision to approve Alternative W-1W under federal law.

Appendix A

RICHARD S. ARNOLD, Circuit Judge, dissenting.

Both the Federal Aviation Administration and this Court make an entirely plausible case for the choice of runway W-1W as the best way to expand Lambert International Airport at St. Louis, so far as air-transportation considerations are concerned. Those considerations are primarily the province of the FAA, not the courts, and our authority to review the substance of the FAA's decision is narrow. In fact, so far as the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. (NEPA), is concerned, we apparently are powerless to review the substance of the agency's decision. See, *e.g.*, *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978). But there is much more to NEPA than this. The central requirement of the statute is procedural. It does not mandate particular results. But it does require that agencies considering major federal actions that will significantly affect the human environment go through a thorough process. All of the considerations, including environmental ones, that lead to the agency's decision are to be thoroughly explored and exposed to the scrutiny of the Congress and the public.

With respect, I believe that both the FAA and this Court have misconceived the nature and purpose of the NEPA process in this case, and I therefore feel constrained to dissent. My reasons may be briefly summarized.

At the center of the NEPA process is a comparison by the agency of all of the reasonably available alternatives for solution to the particular problem confronting it — here, the decision to expand capacity and reduce delay at the airport

in St. Louis. The statute requires that the agency's decision be thoroughly explored in an Environmental Impact Statement (EIS), 42 U.S.C. § 4332(2)(C). A key part of this statement is the evaluation of all reasonable alternatives. See 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1502.14(a) (regulations of the Council on Environmental Quality). But the statute does not stop there. Entirely apart from its provisions regarding the preparation of an EIS, the statute expressly requires a focus on alternatives to a proposed action, including different ways of accomplishing the purpose of the action. See 42 U.S.C. § 4332(2)(E). In addition, the statute requires that economic costs, which are, relatively speaking, quantifiable, be compared with environmental costs, which may seem to some "soft" or difficult to describe. Despite the difficulties, the agency must make an effort to quantify all of the costs and benefits, economic and environmental, which it takes into account. See 42 U.S.C. § 4332(2)(B). And all of this must be done not grudgingly, or in a perfunctory way, but "to the fullest extent possible." 42 U.S.C. § 4332(2).

I do not question for a minute the good faith and expert judgment of the FAA. But I believe the agency has violated NEPA by excluding from detailed consideration certain alternatives to its preferred solution. I begin by quoting the agency's own description of its process:

> The DEIS alternatives evaluation utilized a three-tiered evaluation process that concentrated on the purpose and need for the proposed project. The first tier evaluated whether the various alternatives met the purpose and need criteria established in

Appendix A

> Section 2.0 of the DEIS. Alternatives that satisfied these criteria were retained for evaluation under the second tier of analysis. The second tier evaluated the "constructability" . . . and the benefit/cost ratio (BCR) of the alternatives . . . . Alternatives that met these criteria were retained for evaluation under the third tier of analysis. The third tier evaluated multiple specific criteria relating to operational efficiency (taxi times, delay times), cost per passenger (lower costs vs. higher costs) and environmental impacts (noise, land use, social, etc.).

Record of Decision at 14.

The agency's description of its own process is clear. And, it should be said, there is nothing inherently illegal or irrational about the three-tier analytical approach it has used in this case. If, after considering all alternatives, the agency determines that certain proposed actions will not meet the purpose and need it has in mind, it need not give those alternatives further detailed consideration by comparing environmental and non-environmental costs and benefits as among them. Here, however, it seems to me that the agency has omitted at least one reasonable alternative, referred to by the parties as NE-1a, from detailed consideration. If this alternative is a reasonable one, the agency has erred in discarding it before reaching the third tier of its analysis. This question, in turn, depends on how the purpose and need that the agency is seeking to meet are defined.

Appendix A

The agency has defined the purpose and need of the project as increasing capacity and reducing delay at Lambert. See Appendix of the Petitioner City of Bridgeton, Volume 2, p. 317 (hereinafter cited as App.). NE-1a meets this goal. It would permit a substantial increase in airfield capacity and would substantially reduce projected delay, when compared with the alternative of doing nothing. App. 2:380. FAA itself states that NE-1a does meet the project's goals with respect to the National Airspace System and does meet the hubbing and economic goals of the region. Id. at 378, 380. NE-1a was rejected solely, so far as the EIS reveals, because it did not provide independent simultaneous IFR arrival capability. Certainly this is a desirable goal, and a desirable feature of any solution selected. But it is only one way of achieving increased capacity and reduced delay. As the FAA itself says, independent simultaneous instrument-flight-rules arrival capability is "one of many indicia of a capacity-building alternative." FAA Brief 62. There are many ways of achieving the goal. Independent simultaneous capability is one such way, and it is desirable. The fact that NE-1a lacks this feature, if indeed it does, might be a reason for ultimately rejecting the alternative, but it is not a reason for not comparing NE-1a with W-1W on a detailed basis at the third and last tier of the agency's analysis.

The FAA now says that although NE-1a would increase capacity and reduce delay, it would not accomplish these goals so well as W-1W. This may be true, but it is only one part of the NEPA analysis. Suppose, for the sake of argument, that W-1W will increase capacity and reduce delay better than NE-1a. There are still environmental costs to consider and to place in the balance, in particular, the fact that W-1W

will require the relocation of over 5,000 people in the City of Bridgeton, while NE-1a would require the relocation of almost no one, except people who are already going to be relocated for reasons independent of this particular project. Remember, when we talk about "environmental" considerations here, we are not talking about snail darters (however valuable they may be). We are talking about human beings, their homes and businesses. It seems to me entirely possible that the human and economic cost of moving so many people might be great enough to outweigh the increased transportation benefits of W-1W over NE-1a. But, as the EIS is presently drafted, we do not know the answer to that question, because the FAA never reached it.

Is the fact (assuming for the sake of argument that it is a fact) that NE-1a is inferior, purely as a matter of air-transportation policy, to W-1W sufficient to justify the exclusion of NE-1a from detailed analysis? I think not. This is exactly the sort of thing that NEPA was designed for. The possibility that some substantive benefits of a project might not be great enough to justify its environmental costs is exactly the point of NEPA. In the end, the agency will make this decision, but it is allowed to do so, under the statute, only after a detailed explanation of alternatives. *North Buckhead Civic Association v. Skinner*, 903 F.2d 1533, 1542-43 (11th Cir. 1990), is in point here. In discussing what alternatives an agency must consider, the Court said:

> [A]lternatives that would only partly meet the goals of the project may allow the decision maker to conclude that meeting part of the goal with less environmental impact may be worth the trade off

> with a preferred alternative that has greater environmental impact.

Id. at 1542. To be sure, the facts of the case are different, but the principle underlying it is sound and applies here. Only reasonable alternatives need to be given detailed consideration, but an alternative can be reasonable even if the solution preferred by the agency is clearly superior in substantive terms. *E.g.*, *Surfrider Foundation v. Dalton*, 989 F. Supp. 1309, 1326 (S.D. Cal. 1998), *aff'd per curiam*, 196 F.3d 1057 (9th Cir. 1999).

For these reasons, I conclude that the EIS prepared by the agency in this case did not comply with the law, and I would therefore remand the case to the agency for further proceedings.

Additionally, I cannot agree that the FAA's consistency determination satisfied the Improvement Act. The Act prevents the FAA from approving a project unless it is consistent with the plans "of public agencies authorized by the State in which the airport is located to plan for the development of the area surrounding the airport." 49 U.S.C. § 47106(a)(1). The proposed expansion will lie almost entirely within the boundaries of the City of Bridgeton. The FAA acknowledges that Bridgeton has adopted a development plan diametrically opposed to the W1-W alternative. Nevertheless, the FAA argues that W1-W is reasonably consistent with local development plans because the East-West Gateway Coordinating Council, a regional planning commission, has endorsed the project. But the Council's development plans are "solely advisory" under

Missouri law; its plans exist "solely to aid" local government officials in the development of their binding plans. Mo. Ann. Stat. §§ 251.300, 251.350 (2000). A local government is not required to adopt the Council's development plan. Mo. Ann. Stat. § 251.370 (2000). In this case, the City of Bridgeton most emphatically rejected the Council's plan.

It distorts the plain language of the Improvement Act to find consistency under these conditions. W1-W conflicts with the only non-advisory development plan covering the affected area. It also distorts Missouri law to use the Council's advisory plan as grounds for ignoring a municipality's binding zoning laws. The Court analogizes this case with *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 199 (7th Cir. 1986), where a regional planning commission also approved an airport project. But the *Suburban* court noted only that the agreement of a regional commission provided support for a finding of consistency. *Id.* It declared no per se rule. Moreover, in that case, the commission's plan was unopposed; no local municipality had adopted zoning rules directly contrary to the proposed project.

The Court worries that unless Bridgeton's development plan is ignored, the "interests of the National Airspace System" would be "held hostage to the conflicting plans of a single local community" even though the "relevant" planning agency has approved the plan. *Ante*, at 463. But under Missouri law the East-West Gateway Coordinating Council is not the relevant planning agency. Bridgeton is. Moreover, it is Congress, not Bridgeton, that has ordered the FAA to condition project approval on consistency with

local planning. In attempting to block W1-W by implementing its own contrary development plans, Bridgeton was only acting in accordance with the balance of national and local interests established by Congress, not holding the FAA "hostage."

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3506/98-3774/98-3925

City of Bridgeton; City of St. Charles;
St. Charles County,

Petitioners,

v.

FAA; Rodney E. Slater, in his official capacity as Secretary of Transportation; Jane F. Garvey, in her official capacity as FAA Administrator; John E. Turner, in his official capacity as FAA Regional Administrator,

Respondents.

Petition for Review of the Decision of the
Federal Aviation Administration.

JUDGMENT

This cause was submitted on a petition for review of an order from the Federal Aviation Administration, on the original record, briefs of the parties and was argued by counsel.

Appendix A

After consideration, it is hereby ordered and adjudged that the petitions for review are denied in accordance with the opinion of this Court.

(5272-010199)

April 7, 2000

A true copy

ATTEST: s/ [illegible]

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 13, 2000

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3506/3925/3774

City of Bridgeton, et al.,

Petitioners,

v.

Rodney E. Slater, et al.,

Respondents.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Judge Beam took no part in the consideration or decision of the petitions for rehearing en banc.

(5128-010199)

June 13, 2000

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C — STATUTE AND REGULATION INVOLVED

National Environmental Policy Act, 42 U.S.C. § 4332(2)(C)

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes . . . .

* * *

Council on Environmental Quality regulations, 40 C.F.R. § 1502.14 ("Alternatives including the proposed action")

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the

issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

* * * *

Supreme Court, U.S.
FILED
DEC 13 2000
CLERK

(2)

No. 00-381

In the Supreme Court of the United States

CITY OF BRIDGETON, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Aviation Administration, in preparing an environmental impact statement for a federally-funded construction of a new runway at the Lambert-St. Louis International Airport, made a reasonable determination to eliminate from further evaluation alternatives that did not provide dual simultaneous independent Instrument Flight Rules arrivals, on the ground that such alternatives would not adequately achieve the project's underlying purpose of alleviating current and future delays and capacity limitations.

2. Whether the court of appeals erred in finding that the Federal Aviation Administration applied appropriate criteria and analysis to determine which alternative minimized harm to pertinent resources.

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In the Supreme Court of the United States

No. 00-381

CITY OF BRIDGETON, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 212 F.3d 448.

JURISDICTION

The judgment of the court of appeals (Pet. App. 36a-37a) was entered on April 7, 2000. A petition for rehearing was denied on June 13, 2000 (Pet. App. 38a). The petition for a writ of certiorari was filed on September 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

These consolidated cases arise from a long-studied proposal to construct a third parallel runway at the Lambert-St. Louis International Airport (Lambert).

Owned by the City of St. Louis, Lambert provides commercial air carrier service to the 2.5 million residents of the St. Louis Metropolitan Area, is a major and necessary hub within the National Airspace System, and is consistently one of the twenty most active airports in the United States. Gov't C.A. Br. 10. On September 30, 1998, the Federal Aviation Administration (FAA) issued its Record of Decision (ROD) for the proposed project. In the ROD, the FAA approved the expansion of the Lambert runway system and approved, among other things, the final environmental impact statement (FEIS) and the "Section 4(f)" analysis required by the Department of Transportation Act, and federal funding for the expansion. *Id.* at 49. The court of appeals affirmed the FAA's decision to approve the project. Pet. App. 5a-27a.

1. a. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires federal agencies to prepare an environmental impact statement for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). As part of that statement, the agency must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. 1502.14(a); see 42 U.S.C. 4332(2)(C)(iii).

b. Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303(c), was enacted to protect public parks, recreation areas, and historic sites.[1] Section 4(f)

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[1] Section 4(f) was originally codified as 49 U.S.C. 1653(f) (1970). In 1983, Section 4(f) was repealed and recodified without substantial change at 49 U.S.C. 303(c). See Act of Jan. 12, 1983, Pub. L. No. 97-449, § 1(b), 96 Stat. 2419. Courts and agencies commonly

provides that the Secretary of Transportation may approve a transportation program or project requiring use of "publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance" only if "there is no prudent and feasible alternative to using that land;" and "the program or project includes all possible planning to minimize the harm" to the protected resources. 49 U.S.C. 303(c).

2. a. Lambert "is one of the nation's busiest and most delay-ridden airports." Pet. App. 2a. In 1996 it ranked fourteenth for total passengers emplaned and deplaned, and eighth in total aircraft operations,[2] while also ranking second highest among all United States airports in terms of aircraft delays of fifteen minutes or more per every 1000 aircraft operations. See *id.* at 2a-3a; FEIS 1-10, 2-7 (Bridgeton C.A. App. 308, 323); see also 21 A.R. Doc. 2, at 187. Based upon aircraft delays, the FAA considers Lambert to be one of 23 "delay-problem" airports which frequently cause bottlenecks in the nation's aviation system. ROD 68 (Bridgeton C.A. App. 1595).

Lambert's delay problems stem from a lack of capacity. In particular, for takeoffs and landings, Lambert relies upon two parallel northwest/southeast runways known as 12L/30R and 12R/30L (the numbers denote the compass direction the aircraft faces when on the runway). The centerlines of these two runways are

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refer to the current 49 U.S.C. 303(c) as "Section 4(f)" or "Section 303(c)." Documents in the Administrative Record supporting the Federal Aviation Administration's decision here primarily refer to Section 303(c), but use both terms interchangably.

[2] Total aircraft operations include the sum of landings and takeoffs.

separated by only 1300 feet. See Pet. App. 3a. This close spacing means that, under FAA flight rules, arrival streams on one runway are "dependent" upon approaches on the other runway.[3] Gov't C.A. Br. 11.

The close spacing of the runways becomes particularly troublesome during adverse weather conditions. As weather conditions deteriorate and pilots and air traffic controllers cannot rely upon visual flight rules, instrument flight rules must be used and the airport is reduced to using only one runway with a precision instrument, *i.e.*, advanced radar, approach. FEIS 1-10; ROD 3 (Bridgeton C.A. App. 308, 1523). Because adverse weather conditions requiring instrument flight rules occur 14% of the time at Lambert, the lack of capacity resulting from the closely spaced runways frequently results in substantial delays. 26 A.R. Doc. 1, at 43 (Table B-1) (Gov't C.A. App. 213). And because Lambert is a major, centrally-located hub, delay at Lambert resulting from its "ineffective functioning during inclement weather often disrupts the flow of air traffic nationwide." Pet. App. 3a; see also FEIS 2-19 to 2-22 (Bridgeton C.A. App. 335-338).

Between 1989 and 1993, St. Louis[4] developed a long-term master development plan for Lambert to ensure that the airport will meet both local and national demands. See FEIS 1-11; ROD 12 (Bridgeton C.A.

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[3] Under FAA rules, runways must be separated by a minimum of 4300 feet in order to permit independent simultaneous arrivals unless the runways are served by a Precision Runway Monitor, a navigational aid system comprised of rapid update radar, which permits independent parallel approaches for runways spaced 3400 feet apart. Gov't C.A. Br. 17 n.17.

[4] As used in this brief, "St. Louis" refers to either the city of St. Louis, which owns Lambert, to the St. Louis Airport Authority, which operates Lambert, or both.

App. 309, 1534). Based upon aviation demand forecasts through 2010, a "master plan" was drafted to provide a framework for maximizing potential capacity, reducing delay, and providing a basis for future development decisions. Gov't C.A. Br. 12-17.

During the master plan process and supplemental study, St. Louis, with vital input from FAA, developed more than forty development concepts for Lambert to determine what improvements would best meet projected airport needs by increasing capacity in marginal to poor weather conditions as well as during good weather. See FEIS at S-4, 3-3; ROD 6 (Bridgeton C.A. App. 264, 346, 1526); Pet. App. 4a. Because of the urban location and development surrounding Lambert, any runway construction project for the airport will require land acquisition in a community surrounding the airport. Gov't C.A. Br. 20 n.21.

After more than a decade of study, St. Louis selected one alternative—known as W-1W—which proposed physical improvements at Lambert including the construction of a new parallel runway located on the southwest side of the airport in the City of Bridgeton. The new runway (known as 12W/30W for planning purposes) would be spaced 4100 feet to the west of existing runway 12L/30R and 2800 feet from existing runway 12R/30L. Once 12W/30W is built, 12R/30L will become the center runway. Pet. App. 4a. The new runway is expected to increase Lambert's capacity in all weather conditions by providing for two simultaneous arrival streams that (using the precision runway monitor) can land independently of one another. The new runway also would contribute to more efficient departures. Thus, the new runway would eliminate Lambert's capacity obstacle and allow the airport to meet projected demand forecasts with acceptable delay levels, pro-

viding "significant far-reaching benefit [for] the entire national system." FEIS 2-23 to 2-25, 2-6 to 2-8 (Bridgeton C.A. App. 339-341, 322-324).

b. After selecting W-1W, St. Louis prepared and submitted to the FAA a revised Airport Layout Plan for environmental approval necessary to apply for federal funds. Gov't C.A. Br. 23. For the proposed improvements, the FAA, pursuant to Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), prepared a comprehensive three-volume final environmental impact statement examining reasonable alternatives for and reasonably foreseeable environmental impacts of the proposed project. The FEIS describes the proposed federal action as acquisition of approximately 1568 acres of land, construction of a new 9000 foot runway capable of handling air carrier jet aircraft, and construction of other projects necessary for use of the runway. FEIS 2-2 to 2-4 (Bridgeton C.A. App. 318-320).

The FEIS stated that the purpose of the proposed expansion projects was fourfold: (1) enabling Lambert to accommodate projected levels of aviation activity at an acceptable level of delay by increasing airport capacity; improving visual flight rules (VFR) capacity; allowing dual simultaneous independent instrument flight rules (IFR) arrival operations; and decreasing delays; (2) enhancing the National Airspace System through reducing delays and increasing capacity; (3) recognizing and nurturing the important economic benefits provided by Lambert to local communities and the region; and (4) facilitating the vital hub at Lambert. FEIS 2-1 (Bridgeton C.A. App. 317). The FEIS also

explained that the proposed actions are needed because

1. The existing airport is severely constrained and is projected to be unable to adequately meet projected levels of demand without incurring unacceptable operational delays.

2. As an important component of the National Airspace System, Lambert cannot be allowed to become a "bottleneck," because it would have detrimental ripple-effects throughout the airspace system; and

3. The airport serves an important function in providing economic benefits important to the airport sponsor and the region.

Id. at 2-1 to 2-2 (Bridgeton C.A. App. 317-318).

The FEIS analyzed five categories of alternatives for improving Lambert including (1) using other modes of transportation; (2) using existing or proposed nearby airports to supplement Lambert; (3) constructing a new or replacement airport; (4) using the existing Lambert configuration with advanced navigational aids; and (5) employing an alternative runway configuration to expand the airport. See FEIS 3-4, 3-10 to 3-54 (Bridgeton C.A. App. 347, 353-397).

In analyzing potential runway configurations, the FAA examined geographically-related families of design configurations that had been identified during the master planning process. The first family consisted of three distinct runway alignments located in the northern portion of the airfield: N-1, NE-1, and NE-1a. The second family consisted of runway alignments in the western portion of the airfield: W-1E, W-1W, and W-2. One alternative was considered for development in the southern portion of the airfield: S-1. Each

geographic family included at least one alternative that provided for sufficiently spaced parallel runways to permit simultaneous independent arrivals in poor weather. The master plan alternatives also included a derivative of the original F-4 (chosen and later rejected), known as the Canted Alternative or C-1, and a no-action alternative. Pet. App. 9a-10a; Gov't C.A. Br. 13 n.11.

In the FEIS, to identify and analyze the alternatives that would meet the project's purposes and needs, the FAA used a three-tiered screening process.[5] Through this process, the FAA winnowed the alternatives down

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[5] The first tier attempted to ascertain whether an alternative provided certain factors pertaining to specific criteria identified in the Purpose and Need, namely the ability to increase airfield capacity in good and bad weather and reduce aircraft delay time; the ability to enhance/benefit the National System capacity; and the ability to maintain the passenger hub airport and consistency with local planning and economic goals. FEIS 3-6 to 3-7 (Bridgeton C.A. App. 349-350).

Tier Two evaluated "constructability" criteria such as (1) the ability to maintain continuous 24-hour operations; (2) complexity of staging, phasing, and construction activities; (3) coordination and integration with other development projects; and (4) ability to obtain required permits. To meet the constructability criteria, an alternative must be "buildable without an overwhelming amount of potential construction concerns or interference with the ability to maintain hubbing activities at Lambert." FEIS 3-7 (Bridgeton C.A. App. 350). Tier Two also evaluated the benefit-cost ratio (BCR) of the alternative. *Ibid.* Alternatives satisfying constructability and BCR needs were retained for evaluation at Tier Three. Gov't C.A. Br. 28-29.

The third tier focused on specific purpose and need criteria relating to operational efficiency such as taxi times, delay times, cost per passenger, and environmental impacts (including noise, parkland resources, wetlands, environmental justice, air quality). FEIS 3-8 to 3-10 (Bridgeton C.A. App. 351-353).

by first selecting the best representative in each family based upon which alternative was best overall from an environmental perspective. FEIS 3-5 to 3-10; (Bridgeton C.A. App. 348-53) (describing tiering process). Then, the culmination of the tiering process identified two "build" alternatives–S-1 and W-1W–as reasonable and feasible to meet Lambert's needs and the purposes of the project. FAA thereafter analyzed the environmental impacts of these two alternatives in even greater detail. FEIS 3-47 to 3-49 (Bridgeton C.A. App. 390-392). Although not considered reasonable because of its lack of capacity and long delays, the FAA also considered the no-action alternative (X-1). See FEIS 3-43 (Bridgeton C.A. App. 386). Although other alternative runway alignments considered by FAA were eliminated from further detailed study because they were unreasonable or infeasible, the FEIS listed and provided detailed discussion of each of these alternatives. See FEIS at 3-31 to 3-43 (Bridgeton C.A. App. 374-386). This discussion included detailed reasons for eliminating each build alternative. *Ibid.*; see 40 C.F.R. 1502.14(a).

c. The FEIS also analyzed impacts on lands protected under Section 4(f) of the Department of Transportation Act. These protected lands include public parks, recreational areas, wildlife and waterfowl refuges, and historic sites of national, state, or local significance as well as lands purchased or developed using Section 6(f) of the Land and Water Conservation Fund Act of 1965, 16 U.S.C. 460*l*1-8(f) Additionally, the FAA prepared a separate analysis to accompany the FEIS analyzing impacts and adverse effects of the project on Section 4(f) resources. This analysis, entitled *Section 303 and 6(f) Evaluation*, includes extensive discussion of resources protected under Sections 4(f)

and 6(f). See 59 A.R. Doc. 1 (Bridgeton C.A. App. 948-1316).

The Section 4(f) analysis concluded that there were no feasible and prudent build alternatives other than S-1 and W-1W because other alternatives did not meet the goals and purposes of the project, were not constructable, were not cost-effective, or would have similar or greater adverse impacts upon protected resources. See FEIS at 5-115 to 5-116 (Bridgeton C.A. App. 618-619). The FAA further concluded that the W-1W alignment causes the least damage to Section 4(f) resources. The FEIS identifies mitigation measures to further reduce adverse impacts. FEIS 5-116, FEIS Section 6 (Bridgeton C.A. App. 619, 742-786). For historic sites, FAA consulted with the Advisory Council on Historic Preservation and the Missouri State Historic Preservation Officer. See 60 A.R. Doc. 1 (Bridgeton C.A. App. 1316-1401). To ensure proper mitigation of impacts on historic sites, and to fulfill requirements of the National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.*, before approval of the Lambert project, the FAA, the Advisory Council and the Missouri Historic Preservation Officer entered into a Memorandum of Agreement. See 70 A.R. Doc. 2, at 80 (Gov't C.A. App. 462).

d. After issuing the FEIS, on September 30, 1998, the FAA issued its Record of Decision approving St. Louis's proposal for expansion of Lambert, including construction of runway W-1W. See ROD 123-124 (Bridgeton C.A. App. 1653-1654).[6] The ROD includes

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[6] Specifically the ROD approved the project for federal funding of land acquisition; site preparation; runway, taxiway, and runway safety area construction; landside developments including roadways; navigational aids; acquisition and relocation of the Missouri

FAA's findings under Section 4(f) that W-1W and S-1 are the only feasible and prudent alternatives and that W-1W was the alternative that minimized significant adverse effects on natural resources and historic properties. See ROD 115 (Bridgeton C.A. App. 1644); 70 A.R. Doc. 2, at 80 (Gov't C.A. App. 462) (Memorandum of Agreement). Additionally, the ROD addressed issues raised in post-FEIS information submitted to FAA in comments and at meetings with the agency. See ROD 65-111 (Bridgeton C.A. App. 1592-1639); Pet. App. 6a-8a (describing ROD).

3. After the FAA issued the ROD, the City of Bridgeton filed a petition for review challenging the FAA's decision under NEPA, Section 4(f) of the Department of Transportation Act (49 U.S.C. 1653(f) (1970), recodified, 49 U.S.C. 303(c)), and Section 509(b)(1)(A) of the Airport and Airway Improvement Act of 1982, 49 U.S.C. 47106(a)(1).[7]

National Guard facilities; terminal facility improvement and new terminal facilities; and environmental mitigation. ROD 123-124 (Bridgeton C.A. App. 1653-1654).

[7] In the court of appeals, the City of St. Charles and the County of St. Charles also petitioned for review of the FAA's ROD. Only the City of Bridgeton has filed a petition for a writ of certiorari. With respect to NEPA, the court of appeals held that the FAA had adequately analyzed the adverse environmental impacts of the Lambert expansion, including adverse impacts of increased aircraft overflight noise on the City and County of St. Charles, and of measures to mitigate such impacts. Pet. App. 17a-19a; see also 40 C.F.R. 1502.14-1502.16. The court upheld FAA's choice of noise measurement methodology and refused to require FAA to use the methodology preferred by the St. Charles petitioners. *Ibid.* In addressing Section 4(f) the court of appeals also rejected arguments presented by the St. Charles petitioners regarding the alleged "use" of historic properties by noise from the project. The court of appeals found that noise from the Lambert

The court of appeals upheld the FAA decision. In pertinent part, the court held that the FAA had complied with NEPA, 42 U.S.C. 4321 *et seq.*, by considering a reasonable range of alternatives. The court of appeals held that the FAA appropriately examined "the eight Lambert expansion alternatives considered by St. Louis, plus a no-action alternative and off-site options," and appropriately used a "three-tiered screening process to identify those runway expansion alternatives that would meet the project's purpose and need." Pet. App. 9a. Based upon this process, the court of appeals held that the FAA reasonably selected the alternatives to be analyzed in detail and properly discussed "why the other runway expansion alternatives were eliminated from detailed consideration." Pet. App. 11a-17a.

The court also held that FAA's approval of W-1W complied with Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303(c). The court held that FAA appropriately rejected certain alternatives preferred by petitioner that "would not meet the project's transportation purposes and needs" as not "feasible and prudent" within the meaning of Section 4(f). Pet. App. 23a. Noting that FAA had performed an "extensive comparative § 4(f) analysis" (Pet. App. 24a), the court of appeals upheld FAA's selection of alternative W-1W over alternative S-1 as the environmentally superior alternative. Pet. App. 24a-25a. The court explained:

> The various studies in the record confirm that W-1W would affect historic sites in Bridgeton, while S-1 would have a greater impact on parks in other

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expansion will not "use" the St. Charles Historic District because the District falls outside the 65 dB noise contour and will not be significantly impacted by the project. Pet. App. 19a-21a.

> communities. However, the FAA did far more than merely total up the acres and make a superficial § 4(f)(2) decision. The agency catalogued in detail the nature of each property that would be affected under both alternatives. It discussed each site's location, its size, its function, its significance, the activities associated with it, and the degree to which it would be adversely affected. And most significantly, the agency developed detailed plans to avoid, reduce, or mitigate adverse § 4(f) impacts * * *.

Pet. App. 24a-25a. Based upon its review of the record, the court concluded that FAA's selection of W-1W was properly based upon "relevant factors and an appropriate § 4(f) analysis." *Id.* at 25a.[8] Judge Arnold dissented. In pertinent part, he opined that the FAA improperly failed to include alternative NE-1a within its detailed alternatives analysis under NEPA. Pet. App. 29a-33a.

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[8] The court of appeals rejected petitioners' challenges under the Airport and Airway Improvement Act of 1982. The court found that the FAA reasonably relied upon the findings of the regional planning commission in determining that the project was "consistent with plans (existing at the time the project is approved) of public agencies authorized by the State in which the airport is located to plan for the development of the area surrounding the airport." Pet. App. 25a (citing 49 U.S.C. 47106(a)(1)). The court of appeals also held that, because the W-1W project will not extend into St. Charles County, the County lacked standing to pursue its claim that the ROD improperly failed to certify that the project sponsor had advised "the communities in which a project is located" of the right to "petition the Secretary." 49 U.S.C. 47106(c)(1)(A)(ii). See Pet. App. 27a (citing *Bennett* v. *Spear*, 520 U.S. 154, 163-165 (1997)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, the decision below turns on the particular circumstances of this case and presents no question of exceptional importance meriting review by this Court.

1. NEPA requires that an environmental impact statement discuss, among other things, "alternatives to the proposed action."[9] 42 U.S.C. 4332(2)(C)(iii). Petitioner contends that the Eighth Circuit's ruling is contrary to the fundamental purpose of NEPA because it allows federal agencies to avoid analyzing alternatives that it or the project proponent does not prefer. Pet. 12. This contention is without merit.

The court of appeals correctly held that the FAA defined its objectives in a reasonable manner and reasonably excluded the NE-1a "build" alternative, consisting of adding another closely-spaced parallel runway to the southeast, from further detailed consideration in the FEIS in light of the purposes of and need for the project. The court held that FAA reasonably elevated independent simultaneous arrivals capability as a "critical element of its overall purpose to increase airport capacities and reduce delays." Pet. App. 13a-14a. The court specifically noted FAA's "logical criterion" indicating that runway capacity problems "can usually be most improved by the construction of

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[9] As the court of appeals recognized (Pet. App. 8a-9a), although NEPA establishes "significant substantive goals for the Nation, [the duties it] imposes upon agencies * * * are 'essentially procedural.'" *Strycker's Bay Neighborhood Council, Inc.*, v. *Karlen*, 444 U.S. 223, 227 (1980) (quoting *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978)).

another parallel runway" and "delays can be reduced by the construction of a parallel runway at a sufficient spacing * * * that allows for dual simultaneous Instrument Flight Rules (IFR) operations" during adverse weather conditions (*id.* at 14a). Further, the court found that FAA's statistical data supported the need for simultaneous arrivals capability at Lambert to meet both the short-term and long-term needs of the airport. *Ibid.* The court did not permit the FAA to avoid analyzing reasonable alternatives based on the preferences of the project proponents; rather, it held that, based upon data predicting annual delays, cost and constructability concerns, and potential interference with hub operations, the FAA reasonably eliminated other build alternatives from further detailed study.

2. Petitioner asserts that the court of appeals' decision conflicts with decisions of the Seventh and Eleventh Circuits. Pet. 8-11. That claim is incorrect. The Seventh, Eleventh, and Eighth Circuits agree that an agency must reasonably define the objectives of a proposed project and that the agency's choice of alternatives must be reasonable in light of those objectives. See Pet. App. 9a, 11a, 15a; *Simmons* v. *United States Army Corps of Eng'rs*, 120 F.3d 664, 668-669 (7th Cir. 1997); *North Buckhead Civic Ass'n* v. *Skinner*, 903 F.2d 1533, 1541-1542 (11th Cir. 1990); *Van Abbema* v. *Fornell*, 807 F.2d 633, 638 (7th Cir. 1986). Those courts also recognize that an agency may not evade its obligations under NEPA by imposing an artificially narrow definition of project objectives. Pet. App. 15a; *Simmons*, 120 F.3d at 666; *North Buckhead*, 903 F.2d at 1542.

In *Simmons*, the court held that the Army Corps of Engineers had failed to consider an acceptable range of alternatives to a proposed dam and reservoir that was

intended to supply water to the City of Marion, Illinois, and the Lake of Egypt Water District. 120 F.3d at 666. The Corps had "defined the project's purpose as supplying two users (Marion and the Water District) from a single source." *Id.* at 667. The court of appeals found that purpose to be unreasonably narrow because the Corps had neither considered nor explained why it was preferable that both users be supplied by a single source. See *ibid.* ("At no time has the Corps studied whether this single-source idea is the best one – or even a good one."); *id.* at 668 ("Why the Corps assumed the imperative of a single-source project * * * remained unexplained."). The court concluded that, by so defining the project goal, the Corps essentially "rigged the environmental impact statement." *Id.* at 669.

In the instant case, by contrast, the FAA did not define the project objectives in such a way as to rig the outcome. Consistent with *Simmons*, it reasonably defined the goals of the project as reducing delay in the short term, accommodating the long-term demands faced by the airport, and permitting Lambert to maintain its hub status without requiring construction of an additional new runway before 2015. Pet. App. 12a-15a. The FAA did not limit itself to studying the alternatives that provided independent simultaneous IFR arrivals capacity until it determined that such capacity was needed to meet the general project goals.

Petitioner suggests that the FAA erred in eliminating NE-1a from detailed study because FAA unreasonably focused upon NE-1a's failure (based upon the close spacing of its runway configuration) to provide for dual simultaneous independent arrival capacity. Pet. 10-11. According to petitioner, because NE-1a would provide some temporary increased capacity and reduction in delay, it met the "general" purposes and goals of

the project. Thus, its failure to provide a specific "method" (independent simultaneous arrivals) of increasing capacity and reducing delay did not render it an unreasonable alternative.

The court of appeals rejected petitioner's contention not, as petitioner suggests, because the court "conflate[d] project purposes with methods for achieving those purposes" (Pet. 9), but because data projecting increased passenger demand at Lambert, and consequent need for greater short-term and long-term capacity, indicated that NE-1a was, at best, a short-term strategy which did not meet the long-term goals of increasing capacity and reducing delay for overall efficient operation of Lambert and the National Airspace System. See 20 A.R. Doc. 1, at 4-12 (Gov't C.A. App. at 48); 20 A.R. Doc. 3, Exh. M (Bridgeton C.A. App. 116); FEIS 3-32 (Bridgeton C.A. App. 375). See also Pet. App. 14a-15a (noting that, based upon capacity and delay studies in the Administrative Record considered by FAA, FAA concluded that "NE-1a is essentially a short-term strategy whose delay-reducing limitations would require St. Louis to begin planning for additional runway construction and land acquisition 'long before the year 2015.'"). Thus, the court held that, to meet its long-term goals of increasing capacity and reducing delay, the FAA reasonably considered in greater detail only those alternatives that provided independent simultaneous IFR arrivals capacity. *Ibid.* The decision of the court of appeals is consistent with *Simmons*.

The decision also is consistent with *Van Abbema*. The court in *Van Abbema* stated that "the evaluation of 'alternatives' mandated by NEPA is to be an evaluation of alternative means to accomplish the *general* goal of an action; it is not an evaluation of the alternative

means by which a particular applicant can reach his goals." 807 F.2d at 638. The Seventh Circuit held that the agency, in conducting NEPA analysis, may be required to treat as "reasonable alternatives" measures that a particular permit applicant is incapable of implementing. See *ibid.* ("The fact that this applicant does not now own an alternative site is only marginally relevant (if it is relevant at all) to whether feasible alternatives exist to the applicant's proposal."). *Van Abbema* in no way conflicts with the court's decision here. The alternatives that the Secretary considered were not limited by reference to a permit applicant's particular capabilities; rather, they were limited only after consideration of and with reference to the project goals.[10] The FAA's determination that it would not subject alternative NE-1a to further detailed study was

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[10] In *Citizens Against Burlington, Inc.* v. *Busey*, 938 F.2d 190 (D.C. Cir. 1991), the court expressed concern that the *Van Abbema* court's reference to "the *general* goal of an action" might imply that the reviewing court is itself to define the relevant goal. See *id.* at 199 (emphasis added). The court explained that "[l]eft unanswered in *Van Abbema* * * * is why and how to distinguish general goals from specific ones and just who does the distinguishing. *Someone* has to define the purpose of the agency action. Implicit in *Van Abbema* is that the body responsible is the reviewing court." *Ibid.* The Seventh Circuit has since recognized, however, that in assessing a federal agency's compliance with NEPA, a reviewing court owes deference to the agency's definition of a project's goal. See *Simmons*, 120 F.3d at 668-669; see also Pet. App. 15a. The District of Columbia Circuit also expressed doubt regarding the correctness of the conclusion in *Van Abbema* that NEPA requires an agency to consider alternatives to a private applicant's proposal that could not be considered a "major Federal action[] significantly affecting the quality of the human environment," see *Citizens Against Burlington*, 938 F.2d at 199 (quoting NEPA), but that question is not implicated here.

reasonable under *Van Abbema* because, as the FAA found, and the court of appeals agreed, NE-1a did *not* meet the "general" goals of the project. The FAA explained that it would not conduct further review of NE-1a, not merely because it did not provide independent simultaneous approaches, but also because it was a short-term strategy that would require another runway project at Lambert before 2015 and, in the meantime, could not provide sufficient capacity to meet projected demand levels.

Finally, in *North Buckhead*, the Eleventh Circuit stated in dicta that "an alternative partially satisfying the need and purpose of the proposed project may or may not need to be considered depending on whether it can be considered a 'reasonable alternative.'" 903 F.2d at 1542. The court held in that case, however, that the Federal Highway Administration was not required to undertake a detailed analysis of plaintiffs' preferred "no build/heavy rail alternative." See *id.* at 1543. The court explained that while the plaintiffs' preferred approach "would provide additional transportation capacity in the corridor, the problems of surface street congestion would remain unresolved." *Ibid.* Although petitioner contends that the approaches of the Eleventh and the Eighth Circuits are "irreconcilable" (Pet. App. 11), *North Buckhead* would not compel more extensive consideration of alternative NE-1a, which fails to meet the long-term goals of Lambert and the National Airspace System and thus is not a reasonable alternative. The decisions are easily reconciled.

3. Under Section 4(f)(2) of the Department of Transportation Act, an agency may approve a transportation project that uses park resources only if the "program or project includes all possible planning to minimize harm to the" protected resource. 49 U.S.C. 303(c)(2). Peti-

tioner contends (Pet. 12-17) that the court of appeals' holding that the FAA complied with the requirements of Section 4(f)(2) conflicts with decisions of the Fifth Circuit in *Louisiana Environmental Society (LES)* v. *Coleman*, 537 F.2d 79, 86 (1976), and the Eleventh Circuit in *Druid Hills Civic Association* v. *Federal Highway Administration*, 772 F.2d 700, 716 (1985). Petitioner claims that FAA's failure to conduct a "qualitative analysis" of the harm to resources protected by Section 4(f) violated its responsibility to select the alternative that "does the least harm to the affected Section 4(f) resources." Pet. 13. These contentions are without merit.[11]

a. The court of appeals expressly recognized the statutory requirement that the project include all possible planning to minimize harm (Pet. App. 23a). Petitioner misstates the court of appeals' decision as holding that an agency may satisfy Section 4(f)(2)'s requirement that the agency minimize harm to protected resources (Pet. 13) merely by selecting the alternative that uses the fewest acres of protected resources. An analysis of the court of appeals' decision shows that the court did not so hold. Although the FAA (and the court of appeals) noted that S-1 would impact nine properties while W-1W would impact only

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[11] Section 4(f)(1) provides that the FAA may not approve a transportation project that will use a public park or historic site unless there is no "prudent and feasible alternative to using that land." 49 U.S.C. 303(c)(1). In the court below, the petitioner challenged the FAA's determination that alternatives N-1, NE-1, and NE-1a were not prudent and feasible alternatives within the meaning of Section 4(f)(1). The court of appeals held that the FAA reasonably concluded that these alternatives were not feasible or prudent for Section 4(f)(1) purposes, Pet. App. 23a, and the petitioner has not renewed the challenge here.

four, the court of appeals found that FAA "discussed each site's location, its size, its function, its significance, the activities associated with it, and the degree to which it would be adversely affected" and "developed detailed plans to avoid, reduce, or mitigate adverse § 4(f) impacts including, with regard to historic properties, a Memorandum of Agreement with interested parties" that petitioner declined to enter into. Pet. App. 25a.[12] This detailed evaluation of the impacts of W-1W and S-1 and the degree to which each alternative would adversely effect protected resources (*ibid.*) led the FAA to conclude reasonably that W-1W was environmentally superior and would have "less severe impacts on resources protected under special purpose laws" than S-1. *Ibid.*

b. Contrary to petitioner's suggestion (Pet. 16), Section 4(f)(2)'s requirement that an agency minimize the harm of a proposed transportation project does not require an agency to develop equally detailed mitigation measures and plans for every alternative before deciding which alternative minimizes harm. The cases relied upon by petitioner (Pet. 13-16) do not hold otherwise.

Petitioner reads too much into *LES* and *Druid Hills* when it states that they require an agency to give the same "caliber of treatment" to each alternative when evaluating it under Section 4(f)(2). Pet. 16. In addressing Section 4(f)(2), both cases held that relocation of a highway "through another portion" of the impacted Section 4(f) property, or other 4(f) properties, "must be considered as a means of minimizing harm." See *LES*,

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[12] See also *Section 303 and 6(f) Evaluation*, 59 A.R. Doc. 1, at 1-14 to 1-15 (Bridgeton C.A. App. 973-974) (comparing projected impacts of W-1W and S-1).

537 F.2d at 85; *Druid Hills*, 772 F.2d at 716. Likewise, both decisions held that this requires the agency to compare the total damage to protected properties from each proposed alternative. The *Druid Hills* court concluded that, in order to facilitate that process, "the administrative record must contain adequate information to enable the Secretary to weigh the relative damage to protected properties." *Druid Hills*, 771 F.2d at 716-717; cf. *LES*, 537 F.2d at 86 (observing that the Secretary did not make "the requisite testing of the various routes" without defining the sort of testing that is required or requiring that it be exactly the same for each alternative).[13]

Thus, *Druid Hills* and *LES* require only a record on each alternative *sufficient to show* that the agency made the evaluation mandated by Section 4(f)(2); they do not mandate exactly equal treatment of alternatives. The rule petitioner attempts to draw out of these cases finds no support in them and would convert arbitrary and capricious review into a rigid requirement of equally detailed action with respect to each alternative that could not be reconciled with *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415-416 (1971) (holding that, in reviewing a 4(f) decision for arbitrary or capricious action, courts should consider only "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment") (citations omitted); cf. *Citizens Against Burlington, Inc.* v. *Busey*, 938 F.2d 190, 204 (D.C. Cir. 1991) (rejecting contention that a court can reject a 4(f)(2) determination where the FAA did

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[13] The agency is free to choose among alternatives which cause substantially equal damage. *LES*, 537 F.2d at 86; *Druid Hills*, 700 F.2d at 716.

not pinpoint an exact mitigation strategy because "federal courts are neither empowered nor competent to micromanage strategies for saving the nation's parklands.").[14]

The FAA considered both S-1 and W-1W as alternative runway alignments and concluded that, based upon the quantum of harm to resources protected under Section 4(f), W-1W is the alignment which minimizes harm. Based upon these findings, the court of appeals' decision here is directly in step with those in *LES* and *Druid Hills*. The conflict alleged by petitioners does not exist.

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[14] Both *LES* and *Druid Hills* involved federal highway projects where the chosen route for a highway and certain alternative routes used parts of parks protected by Section 4(f). See *LES*, 537 F.2d at 82-84; *Druid Hills*, 772 F.2d at 704-707. There is some reason to doubt whether the holdings of these highway improvement cases extend to the FAA's decision here to expand an airport. Airport expansion decisions lack the geographic flexibility for choice of alternative route locations typically available when planning for highway projects. And, significantly, as the court of appeals noted, airport expansion decisions are governed by the congressional mandate "that airport construction and improvement projects that increase the capacity of facilities to accommodate passenger and cargo traffic be undertaken to the maximum feasible extent so that safety and efficiency increase and delays decrease" (Pet. App. 23a-24a, citing 49 U.S.C. 47101(a)(7)). The court of appeals correctly observed (*id.* at 23a) that, in order to harmonize the statutory requirements of Section 4(f) and those found in 49 U.S.C. 47101(a)(7) requiring that airport improvement projects maximize promotion of safe and efficient operations and reduction of delays, it is "doubt[ful]" that Section 4(f) "mandates [such] a rigid least harm standard in airport expansion cases." Pet. App. 23a. In any event, the panel was not asked to and did not rule on whether the least-harm standard applies in airport expansion cases. The court's analysis makes clear that it concluded that the FAA had complied with the least-harm standard. *Id.* at 23a-25a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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